Supreme Court, U.S.
FILED
041330 MAR 29 2005
OFFICE OF THE CLERK

No. 04-

IN THE

Supreme Court of the United States

BERNADETTE FULLER, and all others similarly situated,

Petitioners,

v.

INSTINET, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred when it created a Notice due process violation when its decision to not provide notice to a class in which certification was denied, was in direct conflict with the Seventh Circuit's opinion which stated that notice to a class must be provided, pursuant to Rule 23(e) and is mandatory in both certified and non-certified class actions alike.

2. Whether the Second Circuit erred when it failed to understand that overwhelming statistics that demonstrate that in a racial discrimination action, blacks and Hispanics who receive significantly less pay for the same job, fulfill Rule 23(a)(2)'s requirements.

3. Whether the Second Circuit erred when it refused to apply 42 U.S.C. § 1981(c)'s "impairment" clause to a woman who reported the statute's violation and who was retaliated against and given an evaluation which stopped her from advancing within her company or from receiving a positive recommendation to a new company.

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OPINIONS BELOW

The opinion of the court of appeals is by summary order and not published and is reproduced in the appendix hereto. (Appendix A) (hereinafter "App.A). The decisions of the District Court, denying class certification and summary judgment denying notice to the denied class and for retaliation, are likewise unreported and are reprinted in the appendix. (App. B. and C. respectively).

STATEMENT OF JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on December 29th 2004.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

U.S. STATUTORY PROVISIONS INVOLVED

Rule 23. Class Actions

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

42 U.S.C. § 1981. Equal rights under the law

> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Amd. XIV Section 1, Const.

> [N]or shall any state deprive any person of life, liberty or property without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This Petition presents an important issue of first impression to this Court, over which the federal courts of appeal are divided: does the court after denying class certification have the duty to notify the denied class of persons. The rationale being that the filing of a class action suit tolls the statute of limitations for all the members of the class, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-54, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974); *Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000); *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 627 (7th Cir. 1986). After the suit is dismissed without prejudice or when class certification is denied the statute resumes running for the class members. *Crown, Cork & Seal Co. v. Parker, supra*, 462 U.S. at 354; *Chardon v. Fumero Soto*, 462 U.S. 650, 658-60, 77 L. Ed. 2d 74, 103 S. Ct. 2611 (1983); *Elmore v. Henderson, supra*, 227 F.3d at 1012; *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995); *Glidden v. Chromalloy American Corp., supra*, 808 F.2d at 627; *Stone Container Corp. v. United States*, 229 F.3d 1345, 1355-56 (Fed. Cir. 2000); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1384-85 (11th Cir. 1998) (en banc); *Rodriguez v. Banco Central*, 790 F.2d 172, 179 (1st Cir. 1986). Unless they are notified that the suit is dismissed, they may fail to file their own suits and thus fail to "re-arrest" the statute of limitations,

Glidden v. Chromalloy American Corp., supra, 808 F.2d at 627; *Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1409 (9th Cir. 1989), and as a result they may find themselves time barred without knowing it.

TELLTALE SIGNS OF DISCRIMINATION

Petitioner, Bernadette Fuller, who is black, filed this class action, pursuant to Fed. R. Civ. P. 23(b)(2), on behalf of herself and others after she learned (facts are uncontroverted) that at Instinet, Inc. that there were 62 white vice-presidents, but no black vice-presidents and only one Hispanic vice-president.[1] The 62 White vice-presidents received on an average $148,661. The one Hispanic Vice-President was paid less than one-halve of the white vice-presidents: $70,000. Instinet had no black vice-president.

Ms. Fuller learned that of the 80 highest paid employees at Instinet there was only one black and no Hispanic. Ms. Fuller learned of the 273 employees earning more than $100,000 there were only 6 blacks and 4 Hispanics. Ms. Fuller further learned, that of the 145 managers, that black managers made 13% less than white managers and Hispanic managers made 21% less than white managers. Moreover, while the first 34 non-minority managers made between 200,000 and 100,000, the highest paid minority Instinet manager (35th overall) was Hispanic and made only 100,000.

As a result of Ms. Fuller bringing to the attention of the Equal Employment Office (EEO) the pervasive discrimination at Instinet, and her lawsuit, she was blackballed by her superiors who gave her an immediate

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1. Petitioners at the certification court submitted several Affidavits from their Expert, Richard Faust, and a book of diagrams and charts demonstrating the overwhelming discrimination statistics stated here.

negative evaluation. Instinet had in the past only performed reviews at the end of they year but as a direct result of Ms. Fuller's complaint, Instinet altered its review procedure and gave Ms. Fuller an immediate midyear review. The review was 180% opposite to Ms. Fuller's past reviews[2] and was so damaging to her career that it would have been impossible for her to advance at Instinet or be given an excellent recommendation to a new job at a new company. Ms. Fuller as a result of Instinet's retaliation brought a claim pursuant to Title VII and 42 U.S.C.S. § 1981.

The Second Circuit Court of Appeals *reversed*[3] one of the lower court rulings and the lower court's misunderstanding of Title VII and 42 U.S.C.A. § 1981.[4] The lower court had held that, Ms. Fuller, a black, in a discrimination action could not represent Hispanic persons.[5]

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2. Reviews listed side-by-side below at page 25.

3. It should be noted that the Court of Appeals statement that their decision Affirmed the lower court is inaccurate. (App. A at 2a). The lower court clearly stated that a black could not represent a Hispanic. Petitioners argued for 8 pages in their Brief and for 3 pages in their Reply that a black could represent a Hispanic. Respondents had a caption praising the lower court for not permitting blacks to represent Hispanics over 2 pages. The appellate court thus only partially affirmed an outcome where the lower court refused to consider Hispanic statistics of discrimination because it believed that Hispanics were not represented.

4. It should be noted that Petitioners at the Court of Appeals had to exhaust and squander effort and energy much of her appeal overcoming this issue which the Court of Appeals reversed.

5. The lower court held,

> Plaintiff Cannot Represent Hispanics And Other Minorities

(Cont'd)

In reversing the lower court the Court of Appeals held, "that Supreme Court precedent indicates that a black lead plaintiff can represent a class containing Hispanic employees when a general discrimination manifests itself in the same was against both black and Hispanic employees. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982); *Rossini et al. v. Ogilvy & Mather*, 798 F.2d 590, 598 (1986)." (App. A, at 3a).

REASONS FOR GRANTING THE PETITION[6]

Currently there is little, or better stated, little to no guidance for Rule 23(e)'s effect on a class that has been refused certification. Lower courts protect the "hidden and absent" class members with everything Rule 23 brings to

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(Cont'd)

> Plaintiff, a black woman formerly employed at Instinet, seeks to represent a class consisting of "blacks, Hispanics and other minorities." *Compl.* ¶ 16. It is well-settled, however, that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Falcon*, 102 S. Ct. at 2370 (internal quotations omitted) . Because Ms. Fuller is black and not Hispanic or otherwise a minority, she lacks standing to bring any of the claims presently asserted in a representative capacity on behalf of Hispanic or other non-black minority employees. *See*; *see also Gavenda v. Orleans County*, 1997 WL, 251543, (W.D.N.Y. 1997)

Order denying certification, (App. C., at 22a-23a). Dated 11.26.01.

6. Petitioners bring to the Court's attention that there was a delay of more than two years in the action that was due to the lower court's very busy schedule. Final Certification papers were submitted 12/28/2000. Denial of Class Certification (eleven months later on) 11/28/2001. Summary Judgment papers submitted 11/15/2002 and Final Judgment (fourteen months later on) 1/29/2004.

bear, but once an action fails to gain certification it is though Rule 23 spirals to a bottomless pit without any protection (due process and otherwise) for citizens. Given the extant circumstance and effect in every case where Rule 23 is applied and the class denied, this ultimate Court should offer its welcomed guidance. This Court can and should issue a writ of certiorari to review the opinion of the Seventh Circuit and provide guidance that is greatly needed in this important area of law.

The Seventh Circuit in *Culver v. City of Milwaukee*, 277 F.3d 908 (2002) maintains that the prejudice and injury to absent members of a class action is absolute when they are not notified of dismissal. At length the Seventh Circuit cites tolling statutes (in instances where certification has been denied), which it states, are of no value without notice.

The final consequence in a case such as the one before this Court, as there was in *Culver*, is that United States citizens have their rights protected, prior to certification or denial in a class action proceeding pursuant to Rule 23. The due process problem, under the Fifth Amendment, that arises when an action is denied, is that the citizens have a statutory clock (a property right to bring an action) which runs for the following 90 days and at the end of the 90 days their privilege to bring the action is gone. The citizens are never made aware that a property right which may have value is about to expire without immediate action on their part.

The Second Circuit, on the other hand, has expressly refused to apply the law or logic in *Culver*. With the utmost respect for the Second Circuit, there is no logic in the manner in which the Second Circuit has applied Rule 23(e). There is no legal reasoning in any Second Circuit action that sorts out why the courts apply Rule 23 to include "lack of notice." With regard to Rule 23(e), the Second Circuit follows what

it follows because it follows it. There is virtually no Rule 23(e) Second Circuit law based upon legal reasoning.

The Seventh Circuit, however, in Culver, has made an attempt to tackle (for lack of a better word) a Rule 23 problem that has been left dangling by the lower courts.

Review by this Court also is necessary to address two additional important issues posed by the Second Circuit's decision. First, whether the Second Circuit erred when it misapplied the precedence of this Court's class action ruling in *Bazemore v. Friday*. Similarly, the Second Circuit analysis overruled or misinterpreted this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and forced Petitioners to scientific certainty before Rule 23 was applicable. Thus, the Second Circuit required Petitioners to have prevailed on the merits of the action rather than "whether the requirements of Rule 23 [were] met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974).

Second, despite the plain language of 42 U.S.C. § 1981(c), the "impairment" clause, the Second Circuit misread and misapplied 42 U.S.C. § 1981(c). The Court in error held that a person in effect who was impaired by retaliation had to not only demonstrate that her employment position[7] was shattered because she reported the companies violation of federal law to the EEO office — but in addition — had to prove that she could neatly fit into the poorly

7. "Employment position" to mean, in straightforward language, if that person, by a companies evaluation, had value or merit that would permit her to rise with other employees within the company or if she would seek new employment would she receive a favorable recommendation. After reporting federal violations the answer in this action is that Petitioner would have no future with this company or any other company.

conceived and designed parameters of what the Second Circuit viewed as retaliation. The practical effect, which is uncontroverted, is that under Second Circuit law a person can be legally retaliated against for reporting federal violations but be simultaneously left unprotected by the *statue* which was *designed specifically* to protect persons who report federal crimes. Moreover, the Second Circuit's view of the retaliation statute's effect on an employee who reports a federal crime, cannot be reconciled with either the literal meaning or intended effect of federal statute 42 U.S.C. § 1981(c).

I. A review of Rule 23 (e) is warranted to resolve a conflict between the Second Circuit and the Seventh Circuit as to whether notice is required in an action that fails to obtain certification

a. Rule 23(e) imposes a duty on the district judge that is nondelegable, he being himself a fiduciary of the class" and as the Seventh Circuit stated, in that "[t]he prejudice to class members from a dismissal of which they may be unaware is the same in either (certified or uncertified) case." *Culver* at 914. (parenthesis added.)

In sharp disagreement and conflict with the Seventh Circuit, the Second Circuit affirming the lower court held, "[w]e decline to adopt the rule or reasoning in *Culver* in light of the plain language of former Rule 23(e)." (App.A, at 4a). Thus, the Second Circuit affirmed the lower court's distinction between a certified and a non-certified class action.[8] Clearly the Court was

8. "Plaintiff cites no authority for the proposition that putative class members must be notified of a denial of class certification. Unlike the class members in *Culver*, no prospective class members received any notification of class certification, which would induce them to rely upon this action to protect their interests." (App. B, at 11a).

immensely and profoundly influenced by the fact that it believed the foundation of notification of the class was singularly dependent on whether or not certification occurred.[9] Finally, the Seventh Circuit read the same "plain language of former Rule 23(e)," and came to a conclusion that was 180% opposite to the Second Circuit.

The question too arises: why under Rule 23 should there be a distinction between a class of persons who have been first certified and then decertified – and – a class of persons who are never certified. Under both scenarios the courts have declared – that at that point in time they do not have law or evidence on their side to continue their action – based upon their lead plaintiff. Under due process, the core of which is Notice, to have due process there must be Notice of a Right which will be lost without action taken.

The Seventh Circuit held that whether a class action was certified or dismissed was of no importance or consequence when matched against the prejudice against class members if they failed to receive notice of lack of certification.

The Seventh Circuit emphatically stated that it was a lower court's responsibility to make certain that the class action's attorney notified the class. Justice Posner implied in the strongest language, that notification of all class members in a certified or denied certification class by the district court judge was nondelegable.

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9. In the present action the lower court denied lead plaintiff access to the names and addresses of persons in the class.

b. Rule 23(e) and this Court's Fiduciary Duties to Absent Class Members Mandates that Notice Be Given of The Dismissal of this Action [10]

The Court must represent absent class members in a class that is not certified. In *Culver*, the action had been decertified. In the action *Culver v. City of Milwaukee*, 277 F.3d 908 (2002) the Seventh Circuit held,

> The district judge failed to notify the class members of the decertification of the class. He thought they probably were unaware of the suit and therefore would not be prejudiced by its demise. "Probably" is not good enough; it implies that some class members may well have been prejudiced. Although it is not yet definitively settled whether Rule 23(e) is applicable when a class action suit is dismissed before the class is certified (the rule does not indicate which sense of "class" it intends, the certified or the certified plus the "putative," that is, the class alleged in the complaint before any class is certified), see, e.g., *Rice v. Ford Motor Co.*, 88 F.3d 914, 919-20 n.8 (11th Cir. 1996), we think it the better view, as well as the one suggested in *Glidden v. Chromalloy American Corp.*, *supra*, 808 F.2d at 625-27, that it is indeed applicable to such suits. The prejudice to class members from a dismissal of which they may be unaware is the same in either case. Stated otherwise, the context in which "class" is used in Rule 23(e) indicates that it is

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10. Please note that some Courts considering Rule 23(e) have "conclude[d] that notice may be required by the due process clause of the Fifth Amendment even if not be Rule 23(e)." *Glidden v. Chromalloy American*, 808 F.2d 621 (1986).

> not limited to a certified class. Even cases that refuse to apply Rule 23(e) to putative class actions require notice to the members of the putative class if it seems clear that otherwise their interests would be harmed. E.g., *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 177 (5th Cir. 1975).
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> * * *
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> *Rule 23(e)* is for the protection of the class members, not of the class representative or his lawyer—who will usually have no interest in notifying the class members of the failure of the class action—let alone for the protection of the defendant, who will be content to let sleeping dogs lie. Rule 23(e) should therefore be understood as imposing a duty on the district judge that is nondelegable, he being himself a fiduciary of the class. See *Stewart v. General Motors Corp., 756 F.2d 1285, 1293 (7th Cir. 1985); Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995); Greenfield v. Villager Industries, Inc., supra, 483 F.2d at 832.* The judge's duty is to order notice unless the risk of prejudice to absent class members is nil and to review for adequacy the form of notice proposed by class counsel in response to the order.

Id. at 914-15.

The essence of *Culver* is that the prejudice and injury to absent members of a class action is absolute when they are not notified of dismissal. The Court states that tolling statutes (in instances where certification has been denied), are of no value without notice.

The Seventh Circuit, in *Culver* continues to annunciate the harm and prejudice on lack of notice,

> Stated otherwise, the context in which "class" is used in Rule 23(e) indicates that it is not limited to a certified class. Even cases that refuse to apply Rule 23(e) to putative class actions require notice to the members of the putative class if it seems clear that otherwise their interests would be harmed. E.g., *Pearson v. Ecological Science Corp., 522 F.2d 171, 177 (5th Cir. 1975)*

Culver at 914-15.

The Seventh Circuit relied heavily on *American Pipe* and *Crown, Cork & Seal* and *Glidden*. In *Glidden*, another Seventh Circuit action the Court stated,

> The filing of a suit with a class allegation tolls the running of the statute of limitations with respect to the absent class members. *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974); Susman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978), cert. denied, 445 U.S. 942, 100 S. Ct. 1336, 63 L. Ed. 2d 775 (1980).* The Supreme Court reasoned that absent members may learn of and rely on a suit even though the class has not been certified. But the time begins to run again if the district court refuses to certify the case as a class action. *American Pipe, 414 U.S. at 561; Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983).* Cf. *Chardon v. Fumero Soto, 462 U.S. 650, 77 L. Ed. 2d 74, 103 S. Ct. 2611 (1983).* The voluntary dismissal of the class component of a suit also must restart

> the time. Yet if the absent class members do not receive notice under Rule 23(e) that their champion has abdicated, they will not learn that it is necessary to file suit to protect their own interests. By the time they learn that the representative has given up on the class action, it may be too late; so even if the representative should win his own case, the other members of the class may be left out in the cold. This is a risk whenever and however the plaintiff deletes a class allegation. We therefore conclude that Rule 23(e) applies to this case and that Glidden's election to appeal without waiting for the decision on the motion to certify a class did not convert this case into an individual action. He needed the court's approval.

Glidden at 627.

Notice of class dismissal, under *Culver* is mandatory, and under *Culver* the Court may not guess that "probably" (*id.* at 914) those who were discriminated against did not know of the action and cannot be therefore be prejudiced. Whether a person is aware or not that they are discriminated against does not reduce the unlawfulness or the insidiousness of the discrimination action against them.

The Second Circuit, in effect has stated, that what a "person does not know cannot hurt them." It is wrong logically, it is wrong lawfully and it is in basic conflict with the United States Constitution of America. Finally, it is for the Courts to enforce all laws which are for the common good and it does not depend on whether or not the person was aware that he was statutorily and unlawfully

discriminated against.[11] If a crime is committed against a person, it is still a crime whether or not the person was aware that a crime against his person was taking place.

Moreover, it would be illogical, and an ill-fated assumption at best, that workers at Instinet Corporation were not aware that a discrimination class action was taking place and relied to their detriment upon the action.[12]

c. The Lower Court's Interpretation of Judge Posner's Seventh Circuit decision is directly opposite to Judge Posner's decision in *Culver* whereby he states that Notice must be given similarly in denied certification actions and actions which have been certified and later denied.

The lower court stated that "no prospective members received any notification of class certification, which would induce them to rely upon this action to protect their interests." (App. B, at 11a). It can be stated without any reservation or uncertainty that the lower court believed that a certified action had to exist or be certified before Rule 23(e) could be applied.

It is realistic to believe that Rule 23(e)'s notice requirement to denied classes may not be applicable to all cases and there may have to be practical exceptions that the

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11. "[N]or shall any state deprive any person of life, liberty or property without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws." Amd. XIV Section 1, Const.

12. It was well documented that at all levels at Instinet directly on the same level with Ms. Fuller and above to the CEO that all were aware that a racial discrimination action was ongoing. Similarly, Instinet personally interviewed minorities and friends of Ms. Fuller to gain their thoughts on the racial discrimination action brought by her.

trial judge may declare, but because there may be exceptions should not imply that Circuit Courts should not apply the Seventh Circuit analysis where its application would be consistent with due process. The conflict between the circuits on this issue is one of paramount importance, and it merits resolution by this Court.

II. The Second Circuit discriminatory analysis of Rule 23(e) conflicts with decisions of this Court and forces class actions prove their actions prior to certification with "scientific certainty" or be dismissed.

a. The Second Circuit, parsing this Court's decision in *Bazemore v. Friday* misunderstood this Court's reasoning and permitted the exception to swallow the rule and this Court's decision.

The Second Circuit held, that "failure to account for relevant non-discriminatory factors can reduce the probative value of statistical analyses. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (*per curiam*). (App. A. at 3a). That is true, but viewing this Supreme Court's decision in its entirety this Court, in distinction to the Second Circuit analysis, was recommending that lower courts do not reject actions because they fail to contain all the elements which that court may deem necessary. In fact this Court was at odds with courts that require all factors for certification.

In *Bazemore v. Friday*, the Court held,

> The Court of Appeals erred in stating that petitioners' regression analyses were "unacceptable as evidence of discrimination," because they did not include "all measurable variables thought to have an effect on salary level." The court's view of the evidentiary value of the regression analyses was plainly incorrect. While the omission of variables from a

> regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors "must be considered unacceptable as evidence of discrimination." *Ibid.* Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.
>
> * * *
>
> Importantly, it is clear that a regression analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with *scientific certainty*; rather, his or her burden is to prove discrimination by a preponderance of the evidence. *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981).* Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail. (emphasis added).

Id. at 400-01.

In the present action it was the motion court's opinion, affirmed by the Second Circuit that failure to include what it perceived to be "relevant non-discriminatory factors" was fatal to the action. In doing so, the Court disregarded statistics which appeared to be overwhelming. (See pages 3-4, above,

62 white vice-presidents but no black and one Hispanic vice-president or the salary discrepancies at all levels.) The Second Circuit thus not only rejected the teachings of this Court in *Bazemore*, but the wisdom of this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) who held,

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Id. at 340.

It is also, not any one factor pursued by counsel that illustrated discrimination at Instinet, but wherever one looked discrimination appeared. The converse was also true, that Respondents in this action could not demonstrate any group (vice-presidents, managers, etc.) that was free of discrimination.

b. Direct evidence provided by respondents, and reproduced in charts and graphs for the lower court, and analyzed by a statistician that for every job title blacks and Hispanics were paid significantly less for the same job title, is at a minimum a telltale sign of discrimination if not more sinister.

The Second Circuit states,

> To demonstrate such discrimination, Fuller's sole evidence was a statistical study of job *titles* and *salaries* that failed to take into account any variables other than *race*. (App.A, at 3a). (emphasis added).

That Second Circuit proclamation by itself alone was enough to certify this action. It demonstrated that a black or Hispanic person who had the same position was paid less money for the same work. *Race* is what a racial discrimination action is all about. The fact that a black or Hispanic person received less *salary* for the same *title* as a white person would receive is statistically extremely important. Discrimination took place at Instinet and the statistics and books of diagrams and charts that used *race* as a baseline and charted lower *salaries* for the same *titles* for blacks and Hispanics as their white counterparts should have been sufficient under *Bazemore* and *International Brother Hood of Teamsters*.

The Second Circuit's test defies the main beliefs and principles laid out in *International Brotherhood of Teamsters* by this Court. If a Petitioner cannot reason that a black or Hispanic person who receives significantly less pay for the same job is discriminated against – or for that matter in a sexual context, that a woman who receives significantly less pay for the same job as man would receive, is being discriminated against, it would in effect annul Title VII and

42 U.S.C. § 1981. Additional factors always add more gloss, but when the numbers were so overwhelming, the factors which are uncontroverted, being supplied by the Respondent, this action was more than sufficient to rise up to the bar of certification.

It must not be overlooked that this was a company that of 66 vice-presidents, in the heart of New York City (not in North Dakota), that it could not find even one black man or woman worthy of being vice-president — and could only find one worthy Hispanic.[13] Of the 80 highest paid employees at Instinet there was only one black and no Hispanic. That the first 34 non-minority managers made between 200,000 and 100,000, the highest paid minority Instinet manager (35th overall) was Hispanic and made only 100,000. See pages 3-4.

Petitioners respectfully submit that when the issue is one of race, when it is proven that blacks and Hispanics are paid routinely less for the same job title, Petitioners have met their burden.

c. The Second Circuit affirmed the lower court's support of statistical dueling when the Court refused to accept Petitioners' statistical variables and instead stated the variables that the Respondent and the Court believed should have been used for certification of the class.

The District Court too was fully aware that "statistical dueling" was improper in a motion for certification. (App. C, at 24a). But a Court being attentive and aware and stating on the record that "statistical dueling" is improper does not

13. This Court may take notice that President George W. Bush had little difficulty finding a black, Condoleezza Rice, for Secretary of State and a Hispanic for Attorney General, Alberto Gonzales for what might be considered fairly important governmental positions.

sanitize its opinion by merely being aware of statistical dueling's improperness. In Petitioners' Motion for Certification Petitioners provided the Court with statistics based upon information provided by Instinet.

The lower court refused to accept Richard Faust's (Petitioners' expert) analysis, and in effect disregarded past Second Circuit precedent and stated that a fuller analysis would be needed to have the class certified. The Court, in effect, held that what Petitioners have presented did not prove with *scientific certainty* that Petitioners had proven a prima facie case. Such is not required by Rule 23 and all past decisions.[14] The Second Circuit in its decision was at odds with itself which in past decisions had stated that confrontations of what are proper statistics to prove discrimination are "statistical duelings." *Caridad v. Metro-North*, 191 F.3d 283, 292 (2d Cir. Ct. App. 1999)

Rule 23, however, goes not to certainty at the certification stage but whether (Rule 23(a)(2)) there are "questions of law or fact common to the class," and if there are is there an inference that a violation of Title VII or of Section 1981 may have occurred. A requirement asking, at the certification stage, more than what Petitioners have put before the Court would fundamentally alter and revise Rule 23 because it would be not only asking for a scientific certainty, but in addition, would be going to the merits of the case.[15] If Petitioners could prove all that the Lower District required for certification they would have

14. See footnote #15.

15. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974) (quoted by *Visa Check/ Mastermoney Antitrust Litigation*, 280 F.3d 124, 2001 U.S. App. LEXIS 22480, page 14.

proved the case with scientific certainty and the liability action would have been completed.

III. The Second Circuit has refused to follow the federal statutes actual literal meaning or spirit of 42 U.S.C. § 1981(c)'s: the "impairment" clause and has replaced it with criteria which fails to follow the congressional intent.

42 U.S.C. § 1981(c) states:

> 42 U.S.C. § 1981. Equal rights under the law
>
> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The motion court was led to error when the Court applied the Second Circuit's four-factor test to determine whether or not retaliation had taken place. Whether Ms. Fuller made a prima facie case of retaliation by (1) engaging in a protected activity (notifying Instinet and the EEOC that Discrimination was rampant at Instinet); (2) that her employer was aware of this activity; (3) that her employer took adverse action against her; (4) and whether a causal connection would exist between Ms. Fuller's protected activity and the adverse action. 42 U.S.C. § 1981(c)'s meaning, and accurate statute reading, however, demands a more literal (or actual) interpretation than the Second Circuit has applied.

Impairment means impairment. Webster defines the verb "impair" as "to diminish in quantity, value, excellence or strength." Its noun is "impairment."[16] The Second Circuit's

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16. Webster's Seventh New Collegiate Dictionary.

applied test[17] (or rule) fails to adhere or follow the federal statute and fails to be of assistance to Ms. Fuller, who was certainly impaired after she brought Instinet's discriminatory practice to the head of the EEO and later filed her complaint. She was certainly blackened when Instinet in defiance of 42 U.S.C. § 1981(c), which not only counsels against retaliation but makes it federally unlawful, when they impaired her right to object to discrimination at Instinet by giving her immediately after her discrimination objection, an evaluation that unequivocally impaired her present and future employment.

The Second Circuit's criteria, allows persons such as Ms. Fuller to fall through the cracks though she was supported by 42 U.S.C. § 1981(c)'s "impairment" clause: her right to bring an action without fear of retaliation. The Second Circuit's applied test fails badly to express situations where there was intentional "impairment" that could be covered up or hidden from the intent or spirit of the law, or in this action the statute. Instinet skirted Second Circuit law when immediately after Ms. Fuller denounced Instinet's discrimination, it did not demote her or reduce her salary. Instinet instead for all employment purposes made her a *dead* employee. Her career was finished at Instinet and it would be impossible after five years employment at Instinet to obtain a positive recommendation for a new job at a new company.

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17. Rules or criteria are helpful in case analysis. They must however give way to the literal meaning of the statute, when the Court made criteria and statute diverge. Courts aid in the statutes' completeness or understanding of the statute with their common law additions. That was certainly not the case in this action where no one can argue that Ms. Fuller remained where she was after the discrimination charge as she was prior to her discrimination charge. All that can be stated against Ms. Fuller is that she did not fit into the Second Circuit's definition of the "impairment" clause. (Respondent, Instinet, never argued that Ms. Fuller's evaluation was no worse than it was prior to her discrimination charge.)

The Second Circuit, in its affirmation of the lower court's summary judgment held that "[a]n adverse employment action is a "materially adverse change in the terms, privileges, duration and conditions of employment." *Tregalia v. Town of Manlius*, 313 F.3d 713, 720 (2d Cir. 2002)." (App. A, at 4a-5a). The holding states a truism but, as the Court may see in the present action, the holding fails to include all persons who have been retaliated against and who the statute intended to include. The statute should have included Ms. Fuller and was meant to cover the exact situation Ms. Fuller represents. Ms. Fuller did the correct reporting of a federal violation of § 1981(c) and was unquestionably punished for her role in whistle blowing.

The "impairment" portion of § 1981(c) was not taken into consideration. In that sense the Second Circuit's decision fails to fulfill the requirements of § 1981(c): the "impairment" clause. The Second Circuit "criteria" had drifted away from and took precedence over the federal statutory language.

Following Second Circuit criteria for fulfilling a federal statute's requirements is an excellent beginning. When, however, it is pointed out to the Circuit that its criteria that is used for precedent for lower court's rulings is not fully encompassing and fails to follow the statute, it is then prudent to follow the legislative statute (or provide a reason why it did not follow the statute) and adjust the criteria. In this action it is the retaliation criteria that should have been adjusted.[18]

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18. It is fundamental that in construing the words of a statute "[t]he legislative intent is the great and controlling principle" (*People v. Ryan*, 274 N.Y. 149, 152, 8 N.E.2d 313; . . . Indeed, "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down" (*United States v. Whitridge*, 197 U.S. 135, 143, 25 S. Ct. 406, 408, 49 L. Ed. 696). . . . Finally, where a problem as to the meaning of a given term arises, a court's role is not to delve into the minds of legislators, but rather to effectuate the statute

(Cont'd)

In the action, Ms. Fuller reported the discriminatory statistics above and within days, not months or years, was given an evaluation which forever brought to an end any possibility of rising within the company and forever prohibited any possibility of receiving a positive recommendation if she sought new employment. Moreover, it is also uncontroverted, that in Ms. Fuller's previous five years at Instinet that all her reviews were excellent. Her review after reporting the § 1981(c) violation was scathing and derogatory. The fact that Instinet did not demote Ms. Fuller was in keeping with Instinet's policy of not displaying an immediate red flag under § 1981. It, thus, kept within what Instinet perceived as Second Circuit retaliation law. Instinet, and the Second Circuit law, however, are clearly at odds with the statute: 42 U.S.C. § 1981(c). Moreover, Instinet in the past had provided evaluations on a yearly basis and it is uncontroverted that it changed its policy of evaluation immediately after Ms. Fuller brought her Title VII and § 1981 actions.

Summary judgment was improper in the action because Ms. Fuller deserved all the protections of the "impairment" clause: § 1981(c).

Ms. Fuller respectfully asks the Court to *compare* (side-by-side) the previous review written six months prior, to her racial complaints and her attorney's letter to Doug Atkin, President of Instinet, dated July 27, 1999. Ms. Fuller has the right to a jury trial on the "cause and effect" of her attorneys writing a racial complaint to the President of Instinet and her extremely bad review barely days later. Compare Ms. Fuller's counsel's letter of July 27, 1999 and immediate finished Instinet review August 16, 1999 (directly below).

(Cont'd)
by carrying out the purpose of the statute as it is embodied in the words chosen by the Legislature (see, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538-40).

SUMMARY

Bernadette is dedicated and hard-working employee. Her skill and knowledge have been increasing steadily and she is at the point where I feel that she should begin seeking higher-level work, such as some of the projects that the more senior member of the group work on. She has excellent qualitative analysis skills and I would like to see her utilize them more in the future, possibly by assist in compiling the U.S. Market packet with Alaric.

Reviewer and superior, Linda Giordano's Performance Review, dated *12/98*.

COMMENTS

a. "Requires a lot of supervision."

b. "Still cannot perform high level analysis without assistance."

c. "Has not demonstrated that she is capable or willing to move to a position of more responsibility."

d. "Frequent lateness and absence from her desk during the day has put an unfair burden on her co-workers." Instinet's Linda Giordano *Mid-year review, August 16, 1999*, listed her effort at Instinet in such a manner that no employer would ever hire her as an employee.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of the matter.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 29, 2004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 29th day of December two thousand and four.

Present: JON O. NEWMAN,
ROSEMARY S. POOLER,
ROBERT A. KATZMANN,

Circuit Judges.

No. 04-1161

BERNADETTE FULLER,

Plaintiff-Appellant,

ORTEZ TAYLOR, and all others similarly situated,

Plaintiffs,

-v-

INSTINET, INC.,

Defendant-Appellee.

Appendix A

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Plaintiff-appellant Bernadette Fuller appeals from a judgment of the district court granting summary judgment to defendant-appellee Instinet, Inc. on her various claims premised on racial discrimination. On appeal, Fuller challenges the November 28, 2001 order of the district court denying certification of a proposed class of black and Hispanic employees of Instinet, the portion of the January 29, 2004 order of the district court denying Fuller's motion for discovery of the names and addresses of all potential class members, and the portion of the January 29, 2004 order of the district court granting summary judgment to Instinet on Fuller's retaliation claims under Title VII and 42 U.S.C. § 1981. We assume the parties' familiarity with the facts, proceedings below, and specification of issues on appeal.

Fuller first challenges the district court's denial of class certification on the grounds that the statistical study she offered as evidence of discrimination was not probative of discrimination, and that she could not represent a class containing Hispanic employees. Denial of class certification is reviewed for abuse of discretion, but with less deference to the district court than when certification has been granted. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999). The party moving for class certification has the burden of showing numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a); *Caridad*, 191 F.3d at 291.

Appendix A

We note that Supreme Court precedent indicates that a black lead plaintiff can represent a class containing Hispanic employees when a general racial discrimination manifests itself in the same way against both black and Hispanic employees. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982); *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986). To demonstrate such discrimination, Fuller's sole evidence was a statistical study of job titles and salaries that failed to take into account any variables other than race. Statistical studies can establish a class and even a prima facie case of discrimination. *Caridad*, 191 F.3d at 292; *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). However, failure to account for relevant non-discriminatory factors can reduce the probative value of statistical analyses. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (per curiam); *Sainte Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 400 (2d Cir. 1981); *compare Caridad*, 191 F.3d at 288 (reversing denial of class certification supported by statistical study accounting for non-discriminatory factors despite other potential flaws) *with Sheehan v. Purolator, Inc.*, 839 F.2d 99, 103 (2d Cir. 1988) (affirming denial of certification supported by statistical study that did not account for non-discriminatory factors). We hold that Fuller's failure to include any relevant non-discriminatory factors in her statistical study left it without probative value, and that she therefore failed to carry her burden under Federal Rule of Civil Procedure 23(a).

Fuller next argues that the district court, having denied class certification, had a duty to ensure that potential class members were notified of that decision by ordering the disclosure of names and addresses of potential class members.

Appendix A

We review a district court's discovery rulings for abuse of discretion. *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 41 (2d Cir. 2004). Federal Rule of Civil Procedure 23(e), as it read prior to the December 1, 2003 amendment, required that "notice of [any] proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." By its terms, former Rule 23(e) does not require notice to potential class members on a denial of class certification. In support of her position, Fuller cites *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002). *Culver* read a notice requirement into former Rule 23(e) for class decertification, and in dicta supported such a requirement for denial of class certification. *Id.* at 914. We decline to adopt the rule or reasoning of *Culver* in light of the plain language of former Rule 23(e). *See, e.g., Maddox & Starbuck, Ltd. v. British Airways*, 97 F.R.D. 395, 397 (S.D.N.Y. 1983).

Fuller finally argues that the district court erred by awarding summary judgment to Instinet on her retaliation claim. We review a grant of summary judgment de novo. *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). To state a retaliation claim, a plaintiff must show that she engaged in protected activity, suffered some adverse employment action, and a causal connection exists between the two. *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 94 (2d Cir. 2001). An adverse employment action is a "materially adverse change in the terms, privileges, duration and conditions of

employment." *Treglia v. Town of Manlius*, 313 F.3d 713, 720 (2d Cir. 2002).

Fuller identifies two instances of retaliation: 1) the "corporate mobilization" against her in January 1999, consisting of three emails establishing some monitoring of Fuller's performance, and 2) Fuller's "scathing and derogatory" performance review of August 1999. We do not believe that monitoring, standing alone, changes the terms, privileges, duration or conditions of employment. As to Fuller's performance review, it was average, both in its numerical ratings and in its balance of positive and negative comments. *See Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 443-44 (2d Cir. 1999) (holding that an average evaluation is not, standing alone, an adverse employment action). Fuller argues that the mid-year timing of the evaluation was unprecedented, but at oral argument Instinet explained that the change in timing was part of a department-wide program. We therefore hold that Fuller has failed to identify any adverse employment action and that summary judgment was appropriate.

We have considered Fuller's other arguments and find them to be without merit.

For the above reasons, we affirm the judgment of the district court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By: s/ Lucille Carr

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 26, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT

99 Civ. 11453 (BSJ)

BERNADETTE FULLER,

Plaintiff,

v.

INSTINET, INC.,

Defendant.

ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff Bernadette Fuller, an African American, brings this action against Instinet, Inc. ("Instinet"), her former employer, alleging that Instinct discriminated against her based on her race by creating a hostile work environment, failing to promote her, and retaliating against her, in violation of 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the New York State Human Rights Law, N.Y. Exec. Law § 296.

Appendix B

Before the Court are two motions: (1) Plaintiffs motion to compel the production of certain information; and (2) Defendant's motion for summary judgment. For the reasons set forth below, the Court DENIES Plaintiff's motion to compel certain information and GRANTS Defendant's motion for summary judgment.

BACKGROUND

The following facts are either undisputed or are alleged by Plaintiff.

Plaintiff Fuller was hired as a marketing specialist in the Clearing Support Services Department by Instinet, an electronic agency securities broker, in June 1994. In 1996, Plaintiff applied for an available position in the Research and Analytics Sales Department – a position that had been publicized by an internal posting. Plaintiff was interviewed for the job and was told that the department was looking for someone with a Series 7 securities license. Plaintiff did not have a Series 7 securities license; the candidate ultimately hired for the position already had such a license. Later in 1996, Plaintiff sought and received a transfer to the Trading Research Department as a trading research analyst.

Plaintiff complains that, during the course of her employment, several of her co-workers made comments that she felt were racially derogatory. Specifically, Plaintiff complains that on two separate occasions in or about February 1997 two of her coworkers – Chris Kwiatkowski and Sal Arnuk – made comments to her about watermelons. She believes these comments were made because of her race.

Appendix B

Plaintiff claims to have reported the comment by Mr. Kwiatkowski to Dorit Zeevie, the Vice-President of her department. (Fuller Aff. ¶ 11). In November 1998, Mr. Arnuk referred to Plaintiff as a "nobody." Plaintiff reported this comment to Ms. Zeevie, the Manager of her Department, Linda Giordano, and Dan Rosenthal and Karen Mohr, who were responsible for equal opportunity matters at Instinet. Plaintiff informed Mr. Rosenthal during a December 1998 meeting that she felt Mr. Arnuk had made this comment because of her race. The matter was reported to Mr. Arnuk's supervisor, who agreed that the comment was "rude" and "shouldn't have been said." (Fuller Dep. at 228-29). Mr. Arnuk was reprimanded, and he left a message on Plaintiff's voicemail apologizing for his comment.

In January 1999, Ms. Giordano spoke to Plaintiff and one of her co-workers, both of whom had been labeled "low performers," as part of a concerted efforted to address performance issues and keep a "track record" of these two individuals. (Pl. Ex. D). Plaintiff alleges that these efforts to "track" her performance were in retaliation for her complaint about Mr. Arnuk's comment.

Plaintiff retained her present counsel in 1999. Plaintiff's counsel sent a letter to Instinet on July 27, 1999, in which they informed Defendant of Plaintiff's claims of unlawful employment practices and suggested that a "mutually satisfactory resolution of this situation, short of litigation," was possible.

On or about August 16, 1999, Plaintiff received a performance review, which contained several negative

comments. At the time of the review, Plaintiff was awarded a bonus and was given no indication that her bonus had been reduced because of her performance. Although performance reviews were, until that time, conducted on a yearly basis, beginning in 1999, performance reviews were conducted every six months. (Giordano Dep. at 13-14). Plaintiff resigned on August 19, 1999 after receiving this review, claiming that she was constructively discharged. (Fuller Aff. ¶ 56).

Plaintiff filed a discrimination and retaliatory charge with the EEOC in or about August 1999. Because the EEOC was unable to resolve Plaintiff's charge within 180 days, it provided Plaintiff with a right to sue letter on or about September 15, 1999. (Compl. ¶ 5). Plaintiff brought this action on October 30, 1999, on behalf of herself and others similarly situated, *i.e.*, "blacks and Hispanics and other minorities" who were employed by Instinet from 1995 to the date of her motion.[1] (Compl. at ¶ 16). This Court denied class certification in an order dated November 26, 2001. Plaintiff appealed the denial of class certification; her appeal was dismissed.

DISCUSSION

I. Plaintiff's Motion to Compel

Plaintiff's motion to compel requests the Court to direct Defendant to provide (1) names and addresses of all putative class members, dating back to 1989; (2) affidavits of all

1. The claims of a co-plaintiff, Ortez Taylor, were dismissed pursuant to a Stipulation and Order of Dismissal, dated April 24, 2000.

employees with access to employment databases and hiring practices, in order to establish whether any documents or data was destroyed.[2]

A. Names and Addresses

Plaintiff moves to compel the production of the names and addresses of "all putative class members." Plaintiff argues that she needs this information so that all putative class members may receive notice that this Court denied the motion to certify this action as a class action. Plaintiff relies upon an opinion by Judge Posner, *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002), in support of this motion.

In *Culver*, the Seventh Circuit held that class members must receive notice of a class decertification. The *Culver* Court also opined that putative class members should be notified when a class action suit is dismissed before the class is certified. 277 F.3d at 914. Plaintiff relies on this language – which is dicta – for the proposition that putative class members in this suit must receive notice that the Court denied class certification. The Court finds this argument unpersuasive.

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2. Plaintiff also appears to seek discovery of the names and addresses of (a) the current and former presidents of Instinet, and (2) the employees who were responsible for the maintenance of Instinet's hiring and employment database and records. Plaintiff offers no reason why she did not make these requests during the discovery phase of this matter, nor does she make any arguments in her Memorandum in support of these requests. These requests are also denied.

Appendix B

As an initial matter, the Plaintiff cites no authority for the proposition that putative class members must be notified of a denial of class certification. Unlike the class members in *Culver*, no prospective class members received any notification of class certification, which would induce them to rely upon this action to protect their interests. Furthermore, requiring notification when a class action suit is dismissed pursuant to a settlement before the class is certified "protect[s] the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class." *Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002) (Posner, J.) Neither of these concerns is present in this case. Plaintiff's motion is denied.

B. Affirmations Concerning the Handling of Documents and Data

Plaintiff seeks to compel the Defendant to provide affirmations from all Instinet employees who "had control over records and data" regarding her claims. Plaintiff bases this motion on an argument that the deposition testimony of certain Instinet employees contradicted representations made by Plaintiff's counsel to the Magistrate Judge during discovery. As an initial matter, the Court notes that these concerns should have been addressed to the Magistrate Judge during discovery, not to this Court one year after the close of discovery and contemporaneous to Defendant's motion for summary judgment. Furthermore, the Court has reviewed the relevant deposition statements and representations made to the Magistate Judge during discovery and finds no

contradiction, let alone any evidence to suggest that Defendant destroyed documents in contravention of discovery rules. Plaintiff's motion is denied.

II. Defendant's Motion for Summary Judgment

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a summary judgment motion, a court must resolve all ambiguities and draw all inferences in favor of the non-moving party. *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 101 (2d Cir. 2001). However, "purely conclusory allegations of discrimination, absent any concrete particulars," are insufficient to defeat a summary judgment motion. *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 63 (2d Cir. 2003) (quoting *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985).

A. Failure to Promote or Transfer

In order to show a prima facie case of failure to promote or transfer, a plaintiff must allege that: 1) she is a member of a protected class; 2) her job performance was satisfactory; 3) she applied for and was denied promotion or transfer to a position for which she was qualified; and 4) the position remained open and the employer continued to seek applicants. *See Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565 (2d Cir. 2000). Here, the position in the Research and Analytics Sales Department was the only position for which Plaintiff applied and was denied. Plaintiff herself states that she was told that the department was looking for someone with a Series 7

securities license. Plaintiff did not have her Series 7 securities license, and the candidate ultimately hired for the position already had such a license. Plaintiff has failed to establish that she applied for any other positions and was denied. Defendant's motion for summary judgment with respect to Plaintiff's failure to promote claim is granted.

B. Other Racial Discrimination Claims

In her complaint, Plaintiff also alleges that she was assigned less desirable tasks than white employees (Compl. at ¶ 6) and that she received less compensation than white employees with less education and experience. (Compl. at ¶ 9). Plaintiff has provided no evidence to support a claim of discrimination regarding assignments; Defendant's motion for summary judgment is therefore granted with respect to this claim.

In order to establish a prima facie case of unequal pay under Title VII, a plaintiff must show (1) the employer pays different wages to employees of different ethnic backgrounds; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; (3) the jobs are performed under similar working conditions; and (4) a showing of discriminatory intent. *See Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999) (prima facie showing for Equal Pay Act claims); *see also Lavin-McEleney v. Marist College*, 239 F.3d 476, 483 (2d Cir. 2001) (Equal Pay Act and Title VII must be construed in harmony; however Title VII disparate treatment claim requires a showing of discriminatory intent, while an Equal Pay Act claim does not).

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The only evidence offered in support of Plaintiff's claim of unequal compensation is the Plaintiff's own statement that

> I found in the waste bin of the copy room the salaries of many if not all Instinet employees. Looking at the list of salaries I saw, that considering my background, that [sic] I had been given one of the lowest starting salaries and my salary continued to be low in comparison to other non-minority employees.[3]

(Fuller Aff. ¶ 39). Plaintiff has failed to provide the Court with a copy of this document she claims to have found in the waste bin. More to the point, Plaintiff, in her affidavit, does not make any claims whether the non-minority employees whom she claims to have higher salaries (a) perform equal work on jobs requiring equal skill, effort, and responsibility, or (2) perform jobs under similar working conditions. Thus, Plaintiff has failed to establish a prima facie case of unequal pay, and Defendant's motion for summary judgment on this claim is dismissed.

C. Hostile Work Environment

To establish a hostile work environment claim, plaintiff must advance evidence sufficient to permit a reasonable juror to find that the "workplace is permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe

3. Plaintiff also relies upon salary data produced by Instinet. This Court has previously consided this data and Plaintiff's contention that it supports her claim of racial discrimination. This argument was rejected in this Court's Order denying class certification.

or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (citations omitted).

> [The] mere utterance of an . . . epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII. For racist comments, slurs, and jokes to constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments.

Schwapp v. Town of Avon, 118 F.3d 106, 110,111 (2d Cir. 1997) (internal quotations and citations omitted).

Here, Plaintiff alleges that the two comments made to her about watermelons and the comment that she was a "nobody" created a hostile work environment. Although these comments were certainly inappropriate, they cannot be characterized as "a steady barrage of opprobrious racial comments."[4] Because the Court finds that Plaintiff has failed to establish a hostile work environment, Defendant's motion for summary judgment is granted.

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4. Plaintiff also appears to allege that she witnessed her co-workers make "remarks regarding the sexual body parts of minority women." (Fuller Aff. ¶ 14). However, she offers no particular facts to support this conclusory allegation, thus it is insufficient to survive a motion for summary judgment.

Appendix B

D. Retaliation

Plaintiff appears to present two claims of retaliation: first, that her supervisors began to keep a "track record" of her job performance after she complained about a co-worker's comment to her; second, that she received a negative performance review – which she claims resulted in her constructive termination – after her attorneys contacted Instinet regarding her discrimination claims.

To sustain a claim for retaliation, a plaintiff must first present sufficient evidence to make out a prima facie case that (1) she engaged in protected activity; (2) her employer was aware of this activity; (3) her employer took adverse action against her; and (4) a causal connection exists between the protected activity and the adverse action. *Cifra v. GE*, 252 F.3d 205, 216 (2d Cir. 2001). Plaintiff is unable to show that Instinet took any adverse action against her, thus Defendant's motion for summary judgment is granted.

A negative employment evaluation, unless accompanied by some additional adverse result, does not constitute an adverse employment action. *Valentine v. Standard & Poor's*, 50 F. Supp. 2d 262, 283 (S.D.N.Y. 1999) (collecting cases). *A fortiori*, the decisions to document an employee's performance – *i.e.*, create a "track record" – cannot, by itself, constitute an adverse employment action.

Plaintiff tries to show that she suffered some harm beyond a negative employment evaluation by stating that after she received her negative performance evaluation in August 1999, she "considered [her]self constructively discharged and

handed in [her] letter of resignation on August 19, 1999."[5] (Fuller Aff. ¶ 56). However, Plaintiff has failed to state a claim of constructive discharge. A person is considered constructively discharged when her employer, rather than discharging her directly, intentionally creates a working environment so intolerable that she is forced to quit. *Terry v. Ashcroft*, 336 F.3d 128, 151-52 (2d Cir. 2003). It is already well established in this Circuit that receiving a negative performance evaluation – even if the employee believes the negative evaluation is unwarranted – does not constitute constructive discharge. *See, e.g., Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996) ("a disagreement with management over the quality of an employee's performance will not suffice to establish constructive discharge"); *Katz v. Beth Israel Med. Ctr.*, 2001 WL 11064, *14 (S.D.N.Y. Jan. 4, 2001) ("An employee is not constructively discharged because she does not like her assignments, receives unfair criticism, or is yelled at by supervisors."). As Plaintiff cannot show constructive discharge and has failed to show any other adverse employment action, she has failed to make a prima facie case of retaliation.

---

5. Plaintiff also tries to characterize her evaluation as *including* an adverse result, stating that a Defendant must prove that her negative evaluation "would not be hindrance to Ms. Fuller either advancing herself at Instinet or in getting a positive recommendation to a new employer." (Pl. Mem. at 15). Plaintiff is attempting to shift her burden. *Plaintiff* must prove that her employer took adverse action against her in order to make out a prima facie case of retaliation.

Appendix B

CONCLUSION

Plaintiff's motion to compel the production of certain information is denied. Defendant's motion for summary judgment is granted. The Clerk of the Court is directed to close this case.

SO ORDERED:

s/ Barbara S. Jones
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
January 26, 2004

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED NOVEMBER 26, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 11453 (BSJ)

BERNADETTE FULLER, ORTEZ TAYLOR, and others similarly situated

Plaintiffs,

v.

INSTINET, INC.,

Defendant.

ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff Bernadette Fuller filed this action on behalf of herself and others similarly situated against Defendant Instinet, Inc. alleging, inter alia, that Instinet has engaged in a pattern and practice of unlawful discrimination and retaliatory conduct against blacks, Hispanics and other minorities at the company in violation of Title VII of the

Appendix C

Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.[1] Plaintiff now moves for an order certifying this case as a class action pursuant to Rules 23(a) and 23(a)(3) of the Federal Rules of Civil Procedure. Specifically, Plaintiff seeks certification of the following class: All blacks, Hispanics and other minorities who were employed by Instinet, Inc. from 1995 through the present. *See* Complaint ¶ 16. For the reasons stated below, Plaintiff's motion is DENIED.

BACKGROUND

Plaintiff Bernadette Fuller is a black woman formerly employed by Defendant Instinet. Fuller alleges that during her time at Instinet, she was discriminated against in numerous ways. For example, Plaintiff asserts that although she requested a promotion every year for five years, she was overlooked on each occasion, while less qualified and less senior white employees were promoted. *See Compl.* ¶ 6. Plaintiff also alleges that despite ample qualifications and repeated requests, on more than one occasion she was denied transfer to a different department within Instinet. *Id.* Within her department, Plaintiff claims that she has been assigned less desirable tasks than her white co-workers, and that although she has consistently excelled in her performance of these tasks, she has been denied an equal opportunity to advance to positions or increased responsibility and greater exposure to the firm's institutional clients. *Id.* at ¶¶ 6-8.

---

1. Although Ortez Taylor originally was named as a plaintiff, he was dismissed from this action pursuant to a Stipulation and Order of Dismissal dated April 24, 2000.

Appendix C

In addition to her complaints regarding her inability to ascend within the company's ranks, Plaintiff asserts that nonminority employees with less education and experience have received larger salaries and bonuses than she has. *Id.* at ¶¶ 9-10, 12. Finally, Plaintiff claims that after seeking legal advice regarding Instinet's allegedly discriminatory activities, she immediately was subjected to retaliation within the company; in particular, she received a "poor, demeaning and insulting" review. *Id.* at ¶ 12. Plaintiff claims that this retaliatory action gave her no alternative but to resign from Instinet. *Id.*

According to Plaintiff, her individual experience was part of a larger pattern and practice at Instinet of systematically excluding blacks, Hispanics and other minorities from employment opportunities. In particular, Plaintiff alleges that Instinet has engaged in such unlawful discriminatory and retaliatory conduct as: (1) failing to provide promotion, transfer and job assignment opportunities to non-minorities on equal basis as is provided to whites; (2) tolerating discriminatory employment practices after being put on notice of their existence; (3) failing to act to remedy known discriminatory conduct, such as demeaning non-minorities and excluding them from policy-making positions; (4) assigning non-minorities to less desirable tasks; and (5) retaliation against blacks who have sought the assistance of attorneys regarding discrimination complaints. *Id.* at ¶ 4.

Appendix C

DISCUSSION

To qualify for class certification, Plaintiff first must prove that the putative class action meets each of the four requirements set forth in Federal Rule of Civil Procedure 23(a): (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *See In re Visa Check/MasterMoney Antitrust Litigation*, 2001 WL 1242717, *3 (2d Cir. 2001); *see also Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 291 (2d Cir. 1999) (party seeking to certify a class bears the burden of demonstrating numerosity, commonality, typicality and adequacy). This court cannot certify the proposed class unless it is persuaded, "after a rigorous analysis, that the prerequisites of Rule 23 (a) have been satisfied." *Caridad*, 191 F.3d at 291 (*quoting General Telephone Co. v. Falcon*, 102 S. Ct. 2364 (1982) (hereinafter Falcon)).[2]

Plaintiff Cannot Represent Hispanics And Other Minorities

Plaintiff, a black woman formerly employed at Instinet, seeks to represent a class consisting of "blacks, Hispanics

2. In addition to fulfilling each of the requirements of Rule 23(a), a plaintiff seeking class certification must also demonstrate that the action qualifies under at least one of the categories set forth in Rule 23(b). *See* 2001 WL 1242717, *3. Because Fuller has not proven compliance with each element of Rule 23(a), however, this court need not consider whether this action qualifies under any of the Rule 23(b) categories.

and other minorities." Compl. ¶ 16. It is well-settled, however, that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Falcon*, 102 S. Ct. at 2370 (internal quotations omitted). Because Ms. Fuller is black and not Hispanic or otherwise a minority, she lacks standing to bring any of the claims presently asserted in a representative capacity on behalf of Hispanic or other non-black minority employees. *See id.*; *see also Gavenda v. Orleans County*, 1997 WL 251543, *1 (W.D.N.Y. 1997) .

Plaintiff Has Not Proven There Exists An Aggrieved Class

Regardless of whether the proposed class is narrowed to include only black employees, Plaintiff's motion still must be denied because she has failed to demonstrate the existence of an aggrieved class.

Although racial discrimination is by definition class discrimination, the allegation that such discrimination has occurred is by itself insufficient to justify certification under Rule 23. *Falcon*, 102 S. Ct. at 2370. "Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. (For an individual seeking class certification) to bridge that gap, he must prove

much more than the validity of his own claim." *Id.* at 2370-71. Thus, critical to proving commonality and typicality in a discrimination case is demonstrating the existence of an "aggrieved class." *See id.* at 2370 n.13; *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 102 (2d Cir. 1988) (affirming denial of class certification on the ground of lack of class-wide proof of an aggrieved class).

A plaintiff may establish the existence of aggrieved individuals in the purported class through affidavits from employees alleging discriminatory treatment or through other evidence, including statistical evidence, establishing the existence of an aggrieved class. *See Sheehan v. Purolator, Inc.*, 103 F.R.D. 641, 648 (E.D.N.Y. 1984), *aff'd* 839 F.2d 99 (2d Cir. 1988); *Ross v. Nikko Securities*, 133 F.R.D. 96, 96-97 (S.D.N.Y. 1990). To support her claim that an aggrieved class exists that shares common questions of law or fact, Fuller offers the expert report of sociologist Richard Faust, as well as her own affidavit. Because this court concludes that Faust's report is fatally flawed, and because Fuller's affidavit standing alone is insufficient to establish the existence of an aggrieved class, Fuller's motion for class certification must be denied.

This court is aware that a motion for class certification is "not an occasion for examination of the merits of the case," and that in deciding such a motion, a district court "may not weigh conflicting expert evidence or engage in statistical dueling of experts." *See In re Visa Check/MasterMoney*, 2001 WL 1242717, *5. At the same time, however, a district court must ensure that the basis of the expert opinion "is not so flawed that it would be inadmissible as a matter of law."

Id.; *see also Cruz v. Coach Stores. Inc.*, 1998 WL 812045, at *4 n.3 (S.D.N.Y.) (disregarding expert report submitted in support of motion for class certification because the report was "fatally flawed"), *aff'd in part, vacated in part on other grounds*, 202 F.3d 560 (2d Cir. 2000). The question before this court, therefore, is "whether plaintiff's expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class." *See In re Visa Check/MasterMoney*, 2001 WL 1242717, *5. The answer in this case is no.

Plaintiff's expert, Richard Faust, analyzes two sets of data concerning Instinet's employees' occupational positions and salaries. The first set, which pertains to the years 1994 through 1999, consists of statistical charts showing the racial and ethnic breakdown of Instinet's employees into nine occupational groups. *Faust Report* at ¶ 9.[3] The second set of data consists of a computer database of 1,306 employees with their race code, current occupational title, current salary and occupational and salary histories. *Id.* at ¶ 10. From this data, Faust selected four specific occupational positions to analyze in detail in terms of their racial composition and salaries.

Faust organizes this data into two correlation charts: The first chart indicates both the race distribution of Instinet employees by year and the occupational distribution by race for the years 1994-1999. The second, which is organized by

3. Faust combined the last four occupational categories to account for the small number of employees contained within each, and then converted the raw numbers provided by Instinet into percentages in order to facilitate the comparison of different racial groups. *Faust Report* at ¶ 6.

occupation position, indicates the current and starting salaries for Instinet employees by race. *Id.* at Exs. A & B. On each chart Faust identifies disparities that exist between white and Hispanic employees, and white and black employees. Based on his analysis of this information, Faust concludes (1) that the disparities in representation of Black and Hispanics in the higher occupational groups in Instinet are substantial and real in the years studied, and (2) that within specific occupational positions at Instinet, Black and Hispanic employees have lower current salaries than whites and these disparities are statistically significant. *Id.* at ¶¶ 21, 34-35.[4]

Faust's analysis does not assist Plaintiff in establishing that there exists an aggrieved class in this case. Faust merely examines the *correlation* between race and occupational position on one hand, and race and salary on the other; he does nothing to demonstrate that race is the cause of the existing disparities. Specifically, his analysis fails to take into account factors such as education, prior work experience and years of service at Instinet. Nor does Faust account for the racial make-up of the applicant pool for particular occupational positions within Instinet. Faust's failure to control for relevant nondiscriminatory factors renders his analysis fatally flawed.[5] *Sheehan*, 839 F.2d at 103; *Ross*, 133

4. Faust's conclusion that a particular disparity is "real" or "statistically significant" is based on his application of the chi-square test of statistical significance. *Id.* at ¶ 17. According to Faust, where the results of this test show statistical significance, "the conclusions is that the disparities could not have arisen by random chance, accident or happenstance." *Id.* at ¶ 16.

5. The flaws in Faust's analysis are exemplified by the following statement: "In this case, since race is the source of the disparities, (Cont'd)

F.R.D. at 97 (rejecting plaintiff's statistical evidence where statistics "merely compared the relative number of men and women in various job titles and failed to offer the relevant comparisons of similarly situated female and male employees (i.e., female and male employees with the same qualifications and experience)") (internal quotations omitted); *Cruz*, 1998 WL 812045, *4 n.3 (finding expert report fatally flawed where "the expert's analysis does not control for non-discriminatory factors and makes no distinctions for education, prior job history or job level") (internal quotations omitted). *See also Caridad*, 191 F.3d at 292-93 (reversing district court's rejection of expert report where expert controlled for various factors one would expect to be relevant to the analysis, and finding that expert report, in conjunction with the anecdotal evidence submitted by Plaintiffs, sufficed to demonstrate commonality).

The only other evidence submitted by Plaintiff to support her claim that there exists an aggrieved class is her own affidavit. This affidavit alone, however, is insufficient to demonstrate the existence of an aggrieved class. *See Sheehan*, 839 P.2d at 103 (district court did not err in finding that submitting an affidavit from only one aggrieved employee other than the named plaintiffs was insufficient to establish a class of aggrieved individuals); *Ross*, 133 F.R.D. at 97 (plaintiffs failed to demonstrate the existence of an aggrieved

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(Cont'd)

statistical significance would indicate that race, not accident or chance, was indeed the source of the disparities." *Id.* at ¶ 16. Yet without controlling for other potential causes such as education level and years of experience, there is no way to know whether race in fact is the source of the disparities.

class where plaintiffs' motion for certification of a class comprising nearly 200 females rested on the sworn allegations of the named plaintiffs and only one putative class member).

In sum, because Plaintiff has presented no evidence – either statistical, anecdotal or otherwise – to demonstrate "the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims," Plaintiff's motion for class certification must be denied. *See Falcon*, 102 S. Ct. at 2370-71.

CONCLUSION

For the reasons set forth above, this court DENIES Plaintiff's motion for class certification.

SO ORDERED:

s/ Barbara S. Jones
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
November 26, 2001

(2)

04-1330

Supreme Court, U.S.
FILED
MAY 5 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BERNADETTE FULLER,

Petitioner,

—v.—

INSTINET, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did former Federal Rule of Civil Procedure 23(e), as it existed prior to the December 1, 2003 amendment, require that notice of the denial of class certification be given to members of the rejected class?

2. Was it an abuse of discretion to hold that a statistical study of Black, Hispanic, and White employees' salaries and distribution across occupational groups lacked probative value in demonstrating the existence of an aggrieved class of Blacks and Hispanics because it failed to take into account any potentially relevant non-discriminatory variables?

3. Does 42 U.S.C. § 1981(c) eliminate the necessity of proving an adverse employment action to sustain a retaliation claim under Section 1981?

CORPORATE DISCLOSURE STATEMENT

Instinet, LLC (misnamed in this action as "Instinet, Inc.") is a wholly owned subsidiary of Instinet Group Incorporated. Instinet Group Incorporated, in turn, is a public company that is approximately 63% owned by a wholly owned subsidiary of Reuters Group PLC, a public company listed on the London Stock Exchange and the NASDAQ exchanges.

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STATUTORY PROVISIONS INVOLVED

Former Federal Rule of Civil Procedure 23(e) (prior to December 1, 2003)

Dismissal or Compromise

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Current Federal Rule of Civil Procedure 23(e) (effective December 1, 2003)

Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

42 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every

State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

COUNTER-STATEMENT OF THE CASE

Respondent Instinet LLC (misnamed in this action as "Instinet, Inc.") is an electronic agency securities broker. Petitioner Bernadette Fuller is a Black former Instinet employee who was hired in June 1994 as a marketing specialist. Three years later, Fuller successfully transferred to a position as a trading research analyst. In August 1999, Fuller precipitously quit her job three days after receiving a "Meets Job Requirements" performance review and an accompanying bonus award. She left Instinet because she purportedly perceived the review as extremely negative and supposedly considered herself "constructively discharged."

Shortly after Fuller's resignation, she commenced this action against Instinet. She alleged that she had experienced racial discrimination and harassment and retaliation at Instinet and, moreover, that there was a pattern and practice of racial discrimination and harassment and retaliation at Instinet. She asserted her claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"); Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. §1981 ("Section 1981"); and the New York Human Rights Law, N.Y. Exec. Law § 296.

Fuller sought to pursue her disparate treatment case as a sweeping class action on behalf of "All blacks and Hispanics and other minorities" who were employed by Instinet at any time from 1995 forward. In September 2000, after full discovery, Fuller moved for class certification. In support of her motion, Fuller submitted the "Expert Report of Richard Faust" (the "Report") that purportedly showed racial discrimination in job placement and in some salaries at Instinet. The Report described differences in the distribution of Blacks and Hispanics, as compared to Whites, across EEO-1 occu-

pational groups and in the salaries of Blacks and Hispanics, as compared to Whites, in certain job categories and then assumed that race was the cause of the observed disparities. The Report stated, "In this case, since race is the source of the disparities, statistical significance would indicate that race, not accident or chance, was indeed the source." The statistical analyses set forth in the Report did not identify or control for *any* of the major non-discriminatory factors, such as education, length of service, work experience, or make-up of the applicant pool, that would be expected to affect salary and representation in particular occupational groups.

The District Court and the Second Circuit both held that the failure to include any relevant non-discriminatory factors in the statistical study rendered it fatally flawed and lacking in probative value with regard to demonstrating the existence of an aggrieved class of Blacks and Hispanics that had shared the same injury that Fuller alleged. On this ground, the District Court ruled that Fuller had not satisfied the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a) and denied her motion for class certification. The Second Circuit affirmed.

Ten months after the District Court's denial of class certification, at the time set for dispositive motions, Fuller moved for an order compelling Instinet to provide the names and addresses of all past and present Instinet employees who would have been members of her rejected class so that they could be given notice of the denial of class certification and the opportunity to pursue individual claims against Instinet. She asserted that such notice was required by Rule 23(e), as it then existed. At the same time, Instinet moved for summary judgment on each of Fuller's claims.

The District Court denied Fuller's motion to compel and granted Instinet's motion for summary judgment on all of Fuller's claims. The Second Circuit affirmed the denial of Fuller's motion to compel, holding that former Federal Rule of Civil Procedure 23(e) did not require notice to members of a proposed class upon the denial of class certification. The Second Circuit also affirmed the summary dismissal of Fuller's retaliation claim on the ground that she failed to identify any adverse employment action. (Fuller did not appeal from the dismissal of any of her other individual claims).

REASONS FOR DENYING THE WRIT

There is no reason for this Court to squander its resources on any aspect of this case. First, the question whether former Federal Rule of Civil Procedure 23(e) required that notice of the denial of class certification be given to members of the rejected class is not an important issue of federal law that should now be settled by this Court because Rule 23(e) has, during the pendency of this case, been completely re-written, making the issue that Fuller presents for review one that has no ongoing significance. In any event, even if former Rule 23(e) remained in place, the Second Circuit's resolution of the notice question under former Rule 23(e) was the outcome mandated by the plain language and purpose of former Rule 23(e), settled law, and sound policy and did not give rise to a conflict in the circuits. Second, the conclusion that Fuller's statistical study was fundamentally flawed and lacked probative value because it failed to take into account any relevant non-discriminatory factors was, contrary to Fuller's contention, entirely consistent with U.S. Supreme Court precedent. Finally, Fuller's argument regarding the "impairment clause" of Section 1981(c) was never raised or consid-

ered below, lacks any legal foundation, and is nothing more than an effort to avoid the application of the well-settled requirement that an adverse employment action must be proved as an essential element of a claim of retaliation.

I

THERE IS NO IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW TO BE RESOLVED, AND NO CONFLICT BETWEEN THE CIRCUITS, AS TO WHETHER FORMER FEDERAL RULE OF CIVIL PROCEDURE 23(e) REQUIRED NOTICE OF THE DENIAL OF CLASS CERTIFICATION

A. Rule 23(e) No Longer Exists in the Form Under Which This Case Was Decided

Guidance is not needed from this Court on the applicability of former Federal Rule of Civil Procedure 23(e) in the event of a denial of class certification because Rule 23(e), as it existed when this case was before the District Court, was completely revised in a December 1, 2003 amendment. When class certification was denied in this action in 2001, and ten months later when Fuller first raised the supposed requirement of giving notice of the denial of certification to members of the rejected class, Rule 23(e) provided:

> Dismissal or Compromise
>
> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal and compromise shall be given to all members of the class in such manner as the court directs.

It is the requirements of this *former* Rule 23(e) that Fuller asks this Court to address in this case.

As amended effective December 1, 2003, Rule 23(e) now provides, in relevant part:

> Settlement, Voluntary Dismissal, or Compromise
>
> (1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.
>
> (B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.
>
> (C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

The language of former Rule 23(e) with respect to notice has obviously been replaced.

The question presented by Fuller for review by this Court with respect to former Rule 23(e) is one that has no current or future significance because it turns on the meaning of language that is no longer part of Rule 23. Neither litigants nor lower courts require direction from this Court regarding the proper application of a provision that was removed from Rule 23(e) in 2003. Rule 23(e), as it now reads, leaves no doubt that notice is not required after the denial of class certification.

This Court should not extend its discretionary jurisdiction to matters that, at best, are of historical interest.[1]

---

[1] Consideration of the question whether former Rule 23(e) required notice of the denial of certification would not even be of any potential value to Fuller. Even if the Second Circuit and District Court had been mistaken in their reading of the plain language of former Rule 23(e), which they were not, there has never been any sug-

B. The Decision Below was Consistent with the Plain Language and Purpose of Former Rule 23(e), Settled Case Law, and Sound Policy

The plain language of former Rule 23(e) made clear, as the Second Circuit found, that notice did not have to be given upon denial of class certification. The only notice requirement in former Rule 23(e) was that "notice of the proposed dismissal or compromise [of a class action] shall be given to all members of the class in such manner as the court directs." A District Court's denial of a motion for class certification clearly is not a "proposed dismissal or compromise."

Denial of class certification raises none of the concerns that animated the notice provisions of former Rule 23(e) and that evidently remain the rationale for Rule 23(e) in its current form. *See Glidden* v. *Chromalloy Am. Corp.*, 808 F.2d 621, 626-27 (7th Cir. 1986). ("Rule 23(e) was designed to prevent representative plaintiffs from settling or dismissing cases to the detriment of absent members of the class.") The judicial act of disallowing class certification presents no reason to question whether a representative plaintiff has allowed his or her own interests to come ahead of those of absent members of the putative class.

Given the clear language and purpose of former Rule 23(e), courts consistently held that notice was not man-

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gestion that it would be appropriate for notice to be given at this late date about a certification denial that occurred over three years ago. The applicable statute of limitations for claims of harassment, discrimination, and retaliation in New York is three years. N.Y. C.P.L.R. § 214(5); *Murphy* v. *Am. Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232. 233 (1983). As the most analogous New York State statute of limitations, the three-year limitation period also applies under Section 1981. *See Johnson* v. *Ry. Exp. Agency, Inc.*, 421 U.S. 454, 462 (1975). Under Title VII, the limitation period is, of course, even shorter. 42 U.S.C. § 2000e-5(e).

dated by former Rule 23(e) upon the denial of class certification. *See, e.g., Maddox & Starbuck, Ltd.* v. *British Airways*, 97 F.R.D. 395, 398 (S.D.N.Y. 1983) ("class certification is denied without notice to the putative class"); *Beaver Assocs.* v. *Cannon*, 59 F.R.D. 508, 510-11 (S.D.N.Y. 1973) ("[T]he Court disapproves of the use of this action as a class claim and the class allegations are hereby stricken. . . . It follows that since the claims asserted herein can appropriately be viewed only as individual, rather than representative, claims, the notice provisions cited above do not apply."); *Dolgow* v. *Anderson*, 53 F.R.D. 664, 690 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 437 (2d Cir. 1972) ("Since the dismissal of the class action aspect of the case is on the merits, no notice to prospective members of the class is required. . . . Subdivision (e) of Rule 23 . . . does not apply to noncollusive involuntary dismissals.") *See also* 7B C. Wright, A. Miller & Kane, Fed. Practice and Procedure § 1797 (2002) ("a dismissal on the ground that the suit is not maintainable as a class action does not fall under Rule 23(e)."); 4 Newburg on Class Actions (4th ed.) § 11.71 (1992) ("The notice requirement of Rule 23(e) would be inapplicable after a class denial ruling."). Fuller has not cited any case that held that former Rule 23(e) required notice following denial of class certification.

A requirement of notice following the denial of class certification would have far-reaching and problematic practical implications. It would mean that any time class certification was sought, however frivolously, and then denied, notice would have to be given to all of the individuals whom the plaintiff had proposed to represent. Such a rule would put a powerful means to menace in the hands of every disgruntled employee, prisoner, or anyone else willing to assert class allegations.

The act of giving notice of certification denial to members of a rejected class would also amount to a massive exercise of client solicitation by the plaintiff's counsel, with the court's imprimatur. The court's involvement in such a process would be unseemly. *See, e.g., Maddox & Starbuck, Ltd.*, 97 F.R.D. at 397 ("In determining whether notice should be given to putative class members when class certification has been denied, the Court will take care to avoid giving rise to barratry. . . ."); *Elias* v. *Nat'l Car Rental Sys., Inc.*, 59 F.R.D. 276, 277 (D. Minn 1973) ("Rule 23 does not require notice under these circumstances and to do so is in a sense merely soliciting a client for plaintiff's counsel under the aegis of the court. This would be improper.").

This Court should deny the Petition because the Second Circuit's decision that denial of class certification did not give rise to a notice obligation was consistent with the plain language and purpose of former Rule 23(e), settled case law under former Rule 23(e), and sound policy.

C. There is No Split of Authority in the Circuits Regarding Whether Former Rule 23(e) Required Notice to be Given of Denial of Class Certification

Contrary to Fuller's contention, the Second Circuit's decision regarding Rule 23(e) does not conflict with the Seventh Circuit's holding in *Culver* v. *City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002). In *Culver*, unlike this case, a class was certified and then decertified years later, prompting the dismissal of the action because the single named plaintiff's claim was moot. *Id.* at 910. In that context, the Seventh Circuit read a notice requirement into former Rule 23(e). That decision, while seemingly mistaken, does not conflict with the Second Circuit's holding in this case.

The Second Circuit in this case decided whether former Rule 23(e) mandated notice following a denial of class certification. By contrast, the Seventh Circuit in *Culver* decided whether former Rule 23(e) required notice of decertification of a class that had previously been certified.[2] Plainly the questions decided in the two cases were different, and their resolution required a distinct weighing of considerations, especially with regard to the possibility that absent class members were relying on the class representative to preserve and advance their claims.[3]

In any event, in view of the subsequent amendment of Rule 23(e), that makes explicit that notice is not required following either an initial denial of certification or a subsequent decertification of a previously certified class, any continuing validity of *Culver* has been undermined. Even if *Culver* had resolved the same issue under former Rule 23(e) as the Second Circuit below in a way that was inconsistent with the Second Circuit's holding, it would not be a reason to grant a writ of certiorari in this case because the holdings in both cases have been rendered irrelevant by the December 2003 amendment of Rule 23(e).

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[2] In contending that the Second Circuit's holding was at odds with *Culver*, Fuller actually depends on an over-reading of dicta in *Culver*, not on its holding. In a statement that was unnecessary to its resolution of the case, the *Culver* court opined that the "better view" is that "Rule 23(e) is applicable when a class action suit is dismissed before the class is certified." *Id.* at 914. A circuit split is not created by dicta.

[3] Fuller erroneously states in her Petition (Petition, p. 14, n. 12) that there was widespread knowledge among Instinet employees about the pendency of her action. In fact, the record contains no evidence that this case attracted any notoriety or that anyone within the scope of her proposed class was even aware of its pendency.

II

THE SECOND CIRCUIT'S HOLDING THAT A STATISTICAL ANALYSIS, THAT DID NOT ACCOUNT FOR ANY RELEVANT NON-DISCRIMINATORY FACTORS, LACKED PROBATIVE VALUE IN DEMONSTRATING DISCRIMINATION DID NOT CONFLICT WITH ANY DECISION OF THIS COURT

The necessity of proof of the existence of an aggrieved class as a threshold prerequisite to class certification in a discrimination case was made clear by this Court in *General Tel. Co. of Southwest* v. *Falcon*, 457 U.S. 147, 157-58 (1982):

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For [a proposed class representative] to bridge that gap, he must prove much more than the validity of his own claim.

Statistical evidence, either alone or in conjunction with anecdotal evidence, is generally the means of demonstrating the existence of an aggrieved class in the class certification context. *See, e.g., Sheehan* v. *Purolator, Inc.*, 839 F.2d 99, 102 (2d. Cir. 1988); *Rossini* v. *Ogilvy & Mather, Inc.*, 798 F.2d 590, 596 (2d Cir. 1986).

To support her motion for class certification, Fuller presented the "Expert Report of Richard Faust," albeit

without ever actually contending expressly that it demonstrated the existence of an aggrieved class of "blacks and Hispanics and other minorities" at Instinet. The Report presented two statistical analyses of Instinet's workforce in the period from 1994 to 1999. The first showed that disparities existed between Whites and Blacks and between Whites and Hispanics with regard to their respective representation in certain EEO-1 occupational groups. Based on a chi-square test of statistical significance, the Report concluded that the observed disparities were "substantial and real (*i.e.*, not the result of chance or accident." Without identifying or controlling for any non-discriminatory factor that could reasonably have been anticipated as a potential cause of the disparities, such as education, length of service, work experience, or make-up of Instinet's applicant pool, the Report asserted that "In this case, since race is the source of the disparities, statistical significance would indicate that race, not accident or chance, was indeed the source."

The second statistical analysis looked at the average starting salary and the average "current" salary, by race, in four job groups. Using the t-test of statistical significance, the analysis concluded that the differences between the average "current" salaries of Whites and Blacks and of Whites and Hispanics were "real and meaningful" in three of the four job groups and were "slightly in favor of the minority employees" in the fourth job group.[4] With regard to the average starting

---

[4] In analyzing "current" salaries, the Report actually used the last reported salary for the employees studied. This meant, for example, that the "current" salary of someone who left Instinet in 1994 was compared to the 2000 "current" salary of others who were still at Instinet when the study was undertaken. No adjustment was made for intervening changes in economic conditions and salary levels.

salary in each of the four job groups, by race, the analysis found an "overall pattern that was strikingly similar to that for current salaries." According to the Report, "[T]hese results show that racial disparities in salary against Black and Hispanic Instinet employees began when they initially assumed their current position and continue to the present time."

Like the District Court, the Second Circuit held that Fuller's "failure to include any relevant non-discriminatory factors in her statistical study left it without probative value" and thus made it insufficient to carry her burden under Federal Rule of Civil Procedure 23(a). Contrary to Fuller's current argument, that ruling does not conflict with this Court's decision in *Bazemore* v. *Friday*, 478 U.S. 385 (1986) (per curiam).

In *Bazemore*, this Court held that it was error to reject regression analyses as proof of racial discrimination in salaries solely on the ground that the analyses did not include "all measurable variables thought to have an effect on salary level." *Id.* at 400. The Court stated that, because discrimination does not have to be proven with "scientific certainty," "it can hardly be said, absent some other infirmity, that an analysis which *accounts for the major factors* 'must be considered unacceptable as evidence of discrimination.' " *Id.* (emphasis added). Significantly, the statistical analyses at issue in *Bazemore*, that the Court accepted as adequate proof of discrimination, examined salary levels not only by race, but also by education, tenure, job title, and job performance, *i.e.*, the "major factors" that testimony in the case had identified as the ones that would normally be expected to influence salary level.

Nothing in *Bazemore* indicates that a finding of impermissible discrimination can be premised on statistical analyses, such as those presented by Fuller, that

accounted for *none* of the factors that might be anticipated to have had an influence on employees' salary levels or distribution across occupational categories. To the contrary, in *Bazemore*, this Court actually anticipated a case like this one when it noted that "There may, of course, be some regressions so incomplete as to be inadmissible as irrelevant." *Id.* The statistical studies on which Fuller relied could not have been more "incomplete." The Second Circuit did not, as Fuller complains, require proof with "scientific certainty" here, but rather proceeded precisely in accordance with *Bazemore* in holding that Fuller's failure to include any relevant nondiscriminatory factors in her statistical analysis "left it without probative value" on the question of the existence of an assigned class.

Supreme Court review of the Second Circuit's decision that Fuller's statistical evidence lacked probative value should be denied just as review was recently denied in *Morgan* v. *United Postal Serv. of Am. Inc.*, No 04-1123, *cert. denied*, 2005 WL 420786 (U.S. Apr. 25, 2005). In *Morgan*, as here, a purported departure from *Bazemore* was cited as a reason to grant a writ of certiorari. Just as there was no conflict with *Bazemore* when the Eighth Circuit found in *Morgan* that "the flaws [in the statistical evidence presented] [were] too many and the probative value too slight for Plaintiffs' regressions to carry the day. . . .", 380 F.3d 459, 472 (8th Cir. 2003), there is no conflict in this case between *Bazemore* and the Second Circuit's holding that Fuller's statistical analysis was too incomplete to have probative value in demonstrating the existence of an aggrieved class of Blacks and Hispanics.

III

THE REQUIREMENT OF PROOF OF AN ADVERSE EMPLOYMENT ACTION IS A WELL-SETTLED ELEMENT OF A CLAIM OF RETALIATION THAT, UNTIL NOW, FULLER HAS NEVER CHALLENGED, AND SECTION 1981(c) HAS NO BEARING ON THE MATTER

A. Arguments Concerning Section 1981(c) Were Never Raised Before

Fuller seeks a writ of certiorari to review the test used by the Second Circuit at the summary judgment stage to determine the legal sufficiency of her retaliation claim. Fuller misleadingly contends that the Second Circuit "refused to follow" the language of Section 1981(c) and instead applied its own, too limiting criteria in affirming summary judgment on her retaliation claim. In fact, Fuller never even mentioned Section 1981(c) before the Second Circuit or in any prior proceedings in this case.

Until now, Fuller accepted the appropriateness of judging her retaliation claim by reference to the familiar test that requires proof of (1) protected activity; (2) an adverse employment action; and (3) a causal connection between the two. Predictably, therefore, the issues addressed by the parties and the courts below focused on whether Fuller could establish an adverse employment action and, if so, whether she could show a causal connection between it and her protected activity. All along, Fuller acknowledged that the tripartite test governed.

Fuller's new arguments based on Section 1981(c) reflect a major change of course in a desperate effort to salvage her retaliation claim. Issues that have not been raised, developed, and decided below should not be addressed by the Supreme Court in the first instance.

B. Section 1981(c) Does Not Set Forth Requirements for Stating a Claim for Retaliation

In her Petition, Fuller does not contest the Second Circuit's holding that she failed to identify any adverse employment action. Nor does Fuller contend that the Second Circuit erred in finding that her August 1999 performance review, on which she focused below in attempting to show an adverse employment action, did not qualify as an adverse employment action. Instead, her argument before this Court is that, under Section 1981(c), all she had to demonstrate to keep her retaliation claim alive was an "impairment," not an adverse employment action.[5] Under this new theory, Fuller presents her August 1999 review, no longer as an adverse employment action, but as something that caused her "impairment."

Fuller cites neither authority nor a rationale for recognizing Section 1981(c) as the statutory basis for a more lax standard for evaluating the sufficiency of retaliation claims under Section 1981. Nor could she. Section

---

[5] Fuller's discussion of her performance reviews at Instinet is replete with misstatements and misrepresentations. She erroneously claims that it is uncontroverted that her reviews were uniformly excellent prior to August 1999. (Petition, p. 24). She misleadingly offers only a small excerpt from her August 1999 review that she describes as "extremely bad" and an equally small excerpt from the most recent prior one that she characterizes as "excellent." (Petition, pp. 24-25). She obscures the significant fact that both reviews postdated her protected activities. (Petition, p. 24). She omits to mention that her August 1999 review was accompanied by a bonus payment that she admitted she had no reason to believe had been diminished due to her review. She presents conjecture as if it were fact in stating the supposed effects of her August 1999 review on her advancement opportunities at Instinet and her ability to get a new job. (Petition, pp. 22, 24) She mistakenly states that it is uncontroverted that Instinet changed its policy of evaluation immediately after she brought her Title VII and Section 1981 actions. (Petition, p. 24).

1981(c) was added to Section 1981 as part of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), and has nothing to do with the elements required to state a cause of action for retaliation. Legislative history reflects that the reason for the addition of Section 1981(c) was to make explicit Section 1981's coverage of both public and private employers. *See* H.R. Rep. No. 102-40(I), at 92 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 630 (Section 1981(c) "confirms section 1981's coverage of both public and private sector employment"); H.R. Rep. No. 102-40(II), at 34 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 731 (Section 1981(c) "is intended to codify Runyon v. McCrary [where] the Court held that Section 1981 prohibited intentional racial discrimination in private, as well as public, contracting. The Committee intends to prohibit racial discrimination in all contracts, both public and private."). Litigation under Section 1981(c) confirms that the subject matter of Section 1981(c) concerns the nature of the entities against which there is a direct right of action under Section 1981. *See, e.g.*, *Anderson* v. *Conboy*, 156 F.3d 167 (2d Cir. 1998); *Fed'n of African Am. Contractors* v. *City of Oakland*, 96 F.3d 1204 (9th Cir. 1996); *Brown* v. *United States*, 271 F. Supp. 2d 225 (D.D.C. 2003).

Fuller's argument regarding Section 1981(c) reflects a fundamental misunderstanding of the nature and purpose of Section 1981(c).

C. The Second Circuit Accurately Stated and Correctly Applied Settled Law on Retaliation

In affirming the summary dismissal of Fuller's retaliation claim, the Second Circuit adhered to the well-settled requirements for stating a retaliation claim under both Section 1981 and Title VII: proof of protected activity, a subsequent adverse employment action, and a

causal connection between the two. *See, e.g.*, *Davis* v. *Dallas Area Rapid Transit*, 383 F.3d 309, 319 (5th Cir. 2004); *Ajayi* v. *Aramark Bus. Servs., Inc.* 336 F.3d. 520, 533 (7th Cir. 2003); *Bryant* v. *Aiken Reg'l Med. Ctrs, Inc.*, 333 F.3d. 536, 543-44 (4th Cir. 2003); *Cardenas* v. *Massey*, 269 F.3d 251, 263 (3d Cir. 2001). There is no claimed disagreement between the Circuits on the required elements of a claim for retaliation under Section 1981. No conflict has been asserted between the Second Circuit's approach to Fuller's retaliation claim and existing Supreme Court authority. There is no reason for this Court to consider the Second Circuit's entirely routine and proper articulation of the recognized elements of a cause of action for retaliation. As has been previously noted, the Supreme Court "make[s] poor use of judicial resources when, . . . [it] take[s] a case merely to reaffirm [without revisiting] settled law." *Powell* v. *Nevada*, 511 U.S. 79, 87 (1994) (Thomas, J., dissenting), citing, *Estelle* v. *Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting), *United States* v. *Shannon*, 342 U.S. 288, 294-95 (1952) (opinion of Frankfurter, J.).

Equally, there is no reason for this Court to examine the Second Circuit's application of basic retaliation law to the particular facts of this case. The application of properly stated law to the facts of a particular case is rarely a matter for Supreme Court review. Supreme Court Rule 12. This case surely is not one of those rare cases in which such review might be appropriate because, as stated above, even Fuller does not argue before this Court that the Second Circuit erred in holding that she failed to identify any adverse employment action.

Nothing in the Second Circuit's straightforward and proper handling of Fuller's retaliation claim warrants Supreme Court review.

CONCLUSION

For the foregoing reasons, Fuller's Petition for a Writ of Certiorari is unfounded and should be denied.

Dated: New York, New York
May 5, 2005

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 16 2005
OFFICE OF THE CLERK

No. 04-1330

IN THE

Supreme Court of the United States

BERNADETTE FULLER, and all others similarly situated,

Petitioners,

v.

INSTINET, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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1. Respondent brief (hereinafter "ResBr"), disregards and avoids the basis of this law action; at Instinet, Inc. there were:[1]

A. 66 Vice-Presidents at Instinet
   1. Zero "0" black Vice-Presidents
   2. One "1" Hispanic Vice-President.[2]

B. 62 White Vice-Presidents at Instinet received on an average $148,661.
   1. The one ("1") Hispanic Vice President was paid less than one-half of the white vice-presidents: $70,000.

C. Of the 80 highest paid employees at Instinet:
   1. There was one ("1") black.
   2. There was no Hispanic of the 80 highest paid.

D. Of the 273 employees earning more than $100,000;
   1. There were only 6 blacks
   2. There were only 4 Hispanics.

E. Of the 145 managers:
   1. Black managers made 13% less than white managers
   2. Hispanic managers made 21% less than white managers.

F. The first 34 non-minority managers made between 200,000 and 100,000.
   1. The highest paid minority Instinet manager (35th overall) was Hispanic and made only 100,000.
   2. The highest paid black did not even make 100,000.

2. While attempting to discredit Petitioner's argument, Respondent never explains why Petitioners demonstration that for every job title (vice-presidents and assortment of managers)

---

[1] It is particularly significant to remember that the district court refused to consider Hispanic statistics because the court believed that Ms. Fuller, a black, could not represent Hispanics. *Please see* PetBr at 4-5. The Court of Appeals *reversed* the district court but the damage could not be undone.

[2] Petitioners at the certification court submitted several Affidavits from their Expert, Richard Faust, and a book of diagrams and charts demonstrating the overwhelming discrimination statistics stated here.

blacks and Hispanics were paid significantly less than their white counterparts.[3]

3. Respondent never addresses the uncontroverted fact that the Court of Appeals *reversed*[4] the District Court when the District Court in error denied Petitioner, Ms. Fuller's, representation of blacks and Hispanics and stated that she could only represent blacks. That argument can not be held to be a harmless error because it automatically threw out all argument and statistics made by Petitioner, Ms. Fuller, on the behalf of Hispanics as well as blacks.

4. Respondent argues (ResBr4) abstractly that the Court must only consider the most obvious form of retaliation; money or position. Petitioner, Ms. Fuller, claims, however, that Instinet has employed a more insidious way of punishing Ms. Fuller for whistle-blowing. Respondent's evaluation, which took place only days after her attorneys contacted Instinet on her behalf, was scathing and derogatory (PetBrief at 25) in a retaliatory manner which made rising within Instinet virtually impossible and made it impossible to get a favorable recommendation to a new job with a new company. Moreover all previous evaluations at Instinet (which without exception were excellent) were done at the end of the year. Instinet created a special evaluation for Ms. Fuller in the middle of the year. At a minimum this was a jury question and not one for summary judgment: whether there was cause and effect of Ms. Fuller's whistle blowing and days later (not months or years later) Instinet conducting for the first time in its history, doing a mid-year evaluation.

5. Respondent, with actual knowledge of this case makes several strange arguments.

A. It states several times that Petitioners waited too long to make their arguments ("Ten months after") (PetBr2) and ("and ten months later") (PetBr4). It is uncontroverted that

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[3] Respondent never takes issue with the statistics presented by Petitioners.

[4] Please see Petitioner's Brief, pp.4-5, Court of Appeals reversing district court.

Petitioners at no time asked for a delay at any time in this action.[5]

In Respondent's footnote 1 (PetBr5-6) it states that this action has taken so long that it would not be appropriate to give notice "about a certification denial that occurred over three years ago." It goes on to say that the statute of limitations has passed on all claims in the same footnote. This is just a mistake on Respondent's part of basic first year law subjects. No statute can run while the issue on appeal is being judged by a higher court. There is no final judgment on any issue before this United States Supreme Court.

This Court in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983) held;

> The principal purposes of the class-action procedure — promotion of efficiency and economy of litigation — would thereby be frustrated. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974) To protect the policies behind the class-action procedure, the Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id., at 554.*
>
> * * *
>
> The *American Pipe* Court recognized that unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights. Only by intervening or taking other action prior to the running of the statute of limitations would they be able to ensure that their rights would not be lost in the event that class certification was denied. Much

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[5] Petitioner attempted to bring an interlocutory appeal within approximately 15 days after certification denial. (12/15/01) Respondent opposed Petitioner's appeal on jurisdictional grounds that appeal was not brought within 10 days. USCA granted Respondent's motion to dismiss. (5/31/02) Current appeal brought under final judgment. It is hollow indeed for Respondent to argue that Petitioner delayed this action when without its opposition the certification appeal could have been heard early in 2002.

> the same inefficiencies would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification. There are many reasons why a class member, after the denial of class certification, might prefer to bring an individual suit rather than intervene. The forum in which the class action is pending might be an inconvenient one, for example, or the class member might not wish to share control over the litigation with other plaintiffs once the economies of a class action were no longer available. Moreover, permission to intervene might be refused for reasons wholly unrelated to the merits of the claim. n4 A putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions — precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.

Id. at 350-51.

Respondent fails to advise this Court that the district court took almost two and a half years to render two decisions that had nothing to do with Petitioner, due to the court's busy schedule. (PetBr5-fn6).

I. Respondent in its brief fails to understand Culver's premise, that underlying Rule 23 is Notice under due process in accord with the constitution and its amendments.

A. Respondent continues to support the Second Circuit which is clearly at odds with the Seventh Circuit.

Respondent clearly in its brief states that the Second Circuit is at odds with the Seventh Circuit. (ResBr6-7) To prop up its claim it relies on Second Circuit district court opinions that never analyze why the decision states what it does. As Petitioners stated in their brief, the Second Circuit follows what it does because it follows it – and nothing more. (PetBr6-7) Respondent also quotes secondary authority which merely restates the law of the Second Circuit.

Similarly Respondent quotes *Dolgow v. Anderson*, 53 F.R.D.664, 690 (EDNY 1971) ("Since the dismissal of the class action is on the merits, no notice to class members is required . . .") (ResBr7).This Court only two years later (1974) stated the opposite. That Rule 23 only requires that Rule 23 requirements be met.[6] Respondent goes on to state that Rule 23(e) is "settled law." If anything it is unsettled law and the Second Circuit has never analyzed Rule 23 law while upholding district courts' law. The Second Circuit is at odds with the Seventh Circuit despite the assertions to the contrary by counsel for Respondent.[7]

It certainly rings truer that a statute that is consistent with Due Process and Notice is presumed to be constitutionally preferred over a statute where Due Process and Notice is not considered. It is for that very constitutional reason that the Seventh Circuit decided Culver in the manner in which it did.

Culver v. City of Milwaukee, 277 F.3d 908 (2002), which also relied on the Fifth Amendment, ((PetBr10) states,

> Stated otherwise, the context in which "class" is used in Rule 23(e) indicates that it is not limited to a certified class. Even cases that refuse to apply Rule 23(e) to putative class actions require notice to the members of the putative class if it seems clear that otherwise their interests would be harmed. E.g., *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 177 (5th Cir. 1975)

Culver at 914-5.

Respondent in error attempts to make a point that no one knew that they were in a class action so they not need receive notice. First, this fails because the Seventh Circuit states the opposite.[8] Second, Ms. Fuller discussed the action with several

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[6] "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)

[7] Respondent states, "There is no split of Authority in the Circuits . . . (ResBr8 Heading) *Culver* states the opposite of what Respondent would have this Court believe."

[8] "He thought they probably were unaware of the suit and therefore (Cont'd)

of her co-workers, of which Instinet was aware. Third, Instinet interviewed several of Ms. Fuller's co-workers. Fourth, Reuters News carried the story of the class action. Fifth, and of the most importance, is that everyone in the class has a property right enabling them to go to Court and initiate an action on their own behalf for at least 90 days after final judgment of this Court. It would be senseless for citizens to have a property right and for the Court to deny them access of knowledge of that right. It would make no sense. Notice is a fundamental right under the Constitution and its Amendments and a key component under Due Process.

B. That the action before this Court may create additional responsibility for the Court system to produce Notice where feasible, should not be used as a deterrent against the attainment of Due Process.

Respondent forcefully argues[9] that notice could be used frivolously. Petitioners ask that the whole movement and progression toward racial equality be considered. That is from slaves to a war based on slavery to the Civil Rights Act of 1875 to the 1887 Florida law causing separate railroad accommodations to Louisiana in 1891 to Tourgée arguing "separate but equal" was unconstitutional to continuing to the Supreme Court with *Plessy v. Ferguson* to *Brown v. Board of Education* to the present. All actions whose final motives were total equality had "practical implications."

II. Under Bazemore, blacks and hispanics that receive less pay for the same position in alarming proportions suffice for probativeness and admissibility.

Respondent chooses not to understand this Court's decision in *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (*per curiam*)[10] and misinterprets its cited case (ResBr13) *Morgan v. United States Postal Serv. Of Am. Inc.*, No. 04-1123, *cert. denied*, 2005 WL 420786 (2005); 380 F.3d 459 (8th Cir. 2003) and failed

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(Cont'd)

would not be prejudiced by its demise."Probably" is not good enough; it implies that some class members may well have been prejudiced. Please see, (PetBr10)

[9] "A requirement of notice following the denial of class certification would have far-reaching and problematic practical implications." (ResBr7)

[10] *Please see* PetBr.15-16, quotes from *Bazemore v. Friday*.

to understand that *Morgan* had many factors and many were too subjective to have the court order certification. In *Morgan*, there were three claims; upward mobility, workings conditions and pay. It was difficult for Plaintiffs to prove upward mobility and working conditions because admittedly their action only applied to approximately one-half of UPS. As far as pay was concerned, the Morgan Plaintiffs' expert admitted[11] that there might not be a pay discrepancy. Even so the Court was a split appeals decision with regard to pay.

The Eighth Circuit[12] in its *Morgan* opinion relied on *Daubert's* reliability test. In *Kumho* this Court further elaborated on *Daubert*. See generally Federal Judicial Center, *Reference Manual on Scientific Evidence 21* (2d ed. 2000) (observing that in *Kumho Tire* the Supreme Court was "less absorbed . . . in formulating general rules for assessing reliability . . . and more concerned about directing judges to concentrate on 'the particular circumstances of the particular case at issue.' This flexible, nondoctrinaire approach is faithful to the intention of the drafters of the Federal Rules of Evidence [].").

Petitioners ask the Court to take a fresh look at the evidence (statistics) above and not denied by Respondents and find that the numbers presented are so overwhelming in every category that they stand rigidly for the fact that they could not have occurred without discrimination.[13] A court has the flexibility (*id.*) to identify and separate those actions of which the racial make-up of salaries and pay in relationship to race demonstrate that those numbers on their own suffice in order to certify. Factors of discrimination should be decided on a case by case basis (as indeed, all cases are decided).[14]

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[11] "No statistically significant disparity between white and black pay existed." *Morgan* at 462.

[12] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)

[13] The Court may never need to offer its decision on whether notice should be provided for a class denied certification, if it finds that the evidence before the Court, presents sufficient evidence to sustain class certification.

[14] Surprisingly, (ResBr.10) Respondent attempts to paint similarities between the present case and *General Tel. Co. v. Falcon*, 457 U.S. 147, 155

(Cont'd)

A. Respondent chooses not to understand that Bazemore supports this exact type of action.

The question for the Court is if certain statistical numbers jump out at you would that be enough. If there are 66 Vice-Presidents and there are no blacks and only one Hispanic is that discrimination? The district court held, that without other factors such as "educational level, prior work experience and years of service at Instinet" (App.C.at 26a) the statistics were not probative. But what would the additional factors prove? Would it lessen the force of the presented statistics? If Instinet paid the one Hispanic Vice-President less than one-half of all the other vice-presidents does this begin to meet *Bazemore's* requirements? Instinet could not pay black vice-presidents less because there were no blacks to pay less to.

What about the fact that of the eighty highest paid there was only one black and no Hispanics? What if we did not have each person's educational background, does this mean that blacks and Hispanics are not smart enough and don't have the proper education? Does it suggest that there are no educated black or Hispanics in New York City or that Instinet believes that even though blacks and Hispanics may graduate from schools such as Columbia and NYU that they still are not educated sufficiently to be hired and advance at Instinet? Petitioners respectfully suggest to the Court that the only way that these numbers are off as much as they are is simply — with purposeful discrimination.[15]

(Cont'd)

(1982). *Falcon,* however, was a strictly hiring circumstance. The U.S. Supreme Court reversed the lower Court's certification because the lead plaintiffs' statistics demonstrated virtually no discrimination. ("The record shows that there is no support for the class claim. Respondent's own statistics show that 7.7% of those hired by petitioner between 1972 and 1976 were Mexican-American while the relevant labor force was 5.2% Mexican-American.") At 33. (C.J.Burger concurring)

[15] *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 340 (1977) ("Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.")

Instinet cannot be left to hide behind an "other factors" defense when what is demonstrated under *Bazemore* is sufficient. Doesn't this mean that *Bazemore* would agree to these numbers as being acceptable? There are too many instances that suggest discriminatory practice at Instinet that do not allow it to hide because all the factors do not appear to be present. At Instinet there are too many "telltale signs of discrimination."

The District Court's limited analysis was particularly damaging for the class because "[s]tatistics alone can make out a prima facie case of discrimination if the statistics reveal "a gross disparity in [the] treatment of workers based on race." *Lopez v. Laborers Int'l Union*, 987 F.2d 1210, 1214 (5th Cir. 1993).

III. 42 U.S.C. § 1981(c)'s impairment clause has at all times been before the Court.

It is implausible that the Respondent is not aware that "retaliation law" is based upon and derived from a statute. The statute is 42 U.S.C. § 1981(c). Whenever retaliation law is applied they are speaking of § 1981(c).[16] A court did not conclude that if a company punished a citizen for bringing a discrimination action that they should be punished – and the punishment should be called retaliation law. Just the opposite is true. The statute came first and the Courts attempted to find criteria to uphold the statute. Not the other way around. There is nothing wrong with the criteria that has been evolved by the Courts but when it is demonstrated to the courts that it is possible for a company to find a loophole in the law which would enable a company who has broken the law and who has punished whistle-blowers, to escape unpunished, courts must first read the statute[17] and then decide if the criteria is useful in the case at hand.

The statute 42 U.S.C. § 1981(c). is clear. The word impairment means simply impairment.

Respondent tosses-out expressions like "well-settled" (ResBr.14) and that it was surprised to learn for the first time

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[16] *See* West and Lexis for cases under 1981(c).Under "Retaliation" cases cite 42 U.S.C. § 1981(c).

[17] *Please see* Frankfurter, *Some Reflections on the Reading of Statutes* (PetBr.23-24).

at this Court that retaliation is based upon a statute. It is not believable.

Respondent states that the reviews postdate her challenging Instinet's discrimination. (ResBr.15,f5) Instinet's attorneys misrepresent to this Court the dates of whistle-blowing and its effect. What Respondent calls "only a small excerpt" from Ms. Fuller's August 16, 1999 review was from her direct superior. (ResBr.15,f5)

Chronological Order of Retaliation:

a. Ms. Fuller's excellent year-end review by her superior, Linda Giordano (12/98)
b. Bassias & Jaffe on Ms. Fuller's behalf wrote a discrimination letter to the President of Instinet, Doug Atkin. July 27, 1999 which he probably received about August 1, 1999.
c. For the first time Instinet conducted a midyear review, August 16, 1999 and gave Ms. Fuller a derogatory and scathing review. Review by Fuller's supervisor, Linda Giordano.

The law of this action should not be a roadmap for companies and for those who write and lecture on the subject how to punish whistle blowers and not be punished for their wrongdoings. In Petitioner's brief it was stated that Ms. Fuller for her protected activity under 42 U.S.C. § 1981 was made a *dead* employee. (PetBr.22) Companies should not believe that they can get around § 1981 punishment if they place into an employee's file and an evaluation review so bad that the employee would in effect be a dead employee. No where to go within the company and without expectation of another company to hire her or him. Added to the advisement to the company would be, make certain not to demote the employee and make certain to pay the regular bonus. (PetBr.24-25)

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of the matter.

Respectfully submitted,

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